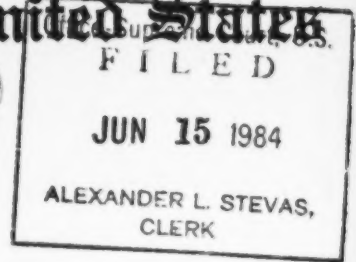


In The  
**Supreme Court Of The United States**  
OCTOBER TERM, 1983  
**83 - 2081** ①



**LEIF R. SIGMOND, Petitioner**

**vs.**

**UNITED STATES OF AMERICA**

**Petition Of Leif R. Sigmond For Writ Of  
Certiorari To The United States Court  
Of Appeals For The Third Circuit**

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court err in refusing to suppress all evidence illegally obtained by the State of New Jersey and subsequently turned over to the Federal Government?
2. Was the Petitioner denied his right to a fair trial as a result of the trial court's admission of evidence as to materials allegedly received by Scientific Chemical Processing, Inc. from generators without proof of the chemical composition of these specific materials?
3. Did the trial court err in refusing to compel discovery by the Government as to the volume and chemical composition of materials allegedly received by Scientific Chemical Processing, Inc. from generators?

4. Did the Petitioner suffer substantial prejudice from the variance between the offenses charged in the Indictment and the proof offered at trial?
5. Did the Court of Appeals err in refusing to order review of the sentence imposed upon the Petitioner on the grounds of disparity and discrimination in sentencing?
6. Did the Court of Appeals err in refusing to reverse the judgment of the trial court on the ground that the jury drew constitutionally impermissible inferences from the Petitioner's decision not to testify?
7. Was the Petitioner denied his Fifth and Sixth Amendment rights as a result of the trial court's failure to enforce a subpoena duces tecum which

was served on the Chief Counsel and Staff Director of the Subcommittee on Oversight and Investigation?

8. Was the Petitioner denied his right to a fair trial as a result of errors committed by the trial court with respect to supervision and instruction of the jury.

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\* The parties to the proceedings in the United States Court of Appeals for the Third Circuit were Leif R. Sigmond, Herbert G. Case, Jr., and Mack Barnes, appellants, and the United States of America, respondent.

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## OPINIONS DELIVERED BELOW

No written opinion was rendered by the United States Court of Appeals for the Third Circuit, although a Judgment Order was entered. (App. A)

No written opinion was rendered by the United States District Court for the District of New Jersey with regard to the entry of the Judgment, Commitment and Order of Conviction (App. B). However, an unpublished written opinion dated November 16, 1982 was rendered by the District Court with regard to various pre-trial motions filed by the defense (App. C).

## GROUND ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The Judgment Order of the United States Court of Appeals for the Third Circuit sought to be reviewed is dated April 16, 1984 (App. A). That Order affirmed without opinion the Judgment, Commitment and Order of Conviction of the

United States District Court for the District of New Jersey entered on May 25, 1983 (App. B).

Jurisdiction is conferred on this Court under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS AND

## STATUTES INVOLVED

The provisions of the United States Constitution and those statutes involved in this case are set forth in Appendix D.

## STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

On June 18, 1982, a Grand Jury for the District of New Jersey returned a 21-count Indictment charging Leif R. Sigmond (the Petitioner herein) Herbert G. Case, Jr., Mack Barnes, and Scientific Chemical Processing Company, Inc. ("Sigmond", "Case", "Barnes", and "SCP") with conspiracy to commit mail fraud and with substantive mail fraud charges.



On November 1, 1982, the defendants' pre-trial motions were heard before the Honorable Dickinson R. Debevoise. Defendants' motions for a bill of particulars, dismissal of the indictment, suppression of evidence, and severance were denied (App. C & E).

Trial commenced before Judge Debevoise on January 27, 1983 and, on March 10, 1983, following approximately six weeks of trial, Case was convicted on counts 1 through 4, 7 through 12, 15 through 17 and 19 through 21. Sigmond was convicted on counts 2 through 4, 7 through 12 and 15 through 17. Barnes was convicted on counts 1 through 4, 7 through 12, 15 through 17, 20 and 21. SCP was convicted on counts 1 through 4, 7 through 12, 15 through 17 and 19 through 21. (App. B).

Defendants' motions for a new trial were heard on May 4, 1983 and denied by Judge Debevoise.

On May 23, 1983, defendants appeared for sentencing. Sigmond was sentenced to thirty months imprisonment, \$10,000 in fines and five years probation. Case was sentenced to eighteen months imprisonment, \$2,000 in fines and five years probation. Barnes was sentenced to six months imprisonment, five years probation and \$500 in fines. (App. F). The evidence presented at trial clearly revealed that Sigmond was less culpable than his co-defendants. It appeared, however, that the trial court imposed a harsher sentence on Sigmond merely because of his position as president of SCP. (App. F) Racial factors were also relied upon by the trial court in imposing the sentences. (App. F).

On June 1, 1983, Sigmond filed a Notice of Appeal. By Judgment Order dated April 16, 1984, the Third Circuit Court of Appeals affirmed the judgment of the trial court. (App. A).

## B. STATEMENT OF FACTS

The Indictment arose out of alleged activities of SCP, and Case, Barnes and Sigmond, as officers and employees, between June 1977 and October 1978. SCP was engaged in processing, recovery, and disposal of various industrial and chemical wastes generated by numerous industries. Some wastes were treated by SCP at its Newark and Carlstadt, New Jersey facilities and then returned to various generators or disposed of by SCP. Other wastes were converted into fuels and sold by SCP. All wastes were transported from the generator's location to either SCP's Newark or Carlstadt facilities. SCP also contracted with outside, independent haulers for transportation of wastes into and out of its facilities.

SCP operated pursuant to permits issued by the New Jersey Department of Environmental Protection ("NJDEP"). NJDEP

authorized SCP to transport wastes and to operate a facility for the treatment, processing and recovery of wastes.

SCP's Newark facility was located within the Passaic Valley Sewerage Commission ("PVSC") district and SCP was an authorized user of PVSC's combined sewerage system, designed for both industrial and domestic use. All sewerage wastes were channeled into an interceptor which flowed to the PVSC treatment plant located a few hundred feet from SCP's Newark facility. SCP's Newark facility was connected to the PVSC interceptor by a lateral sewer line. SCP's discharges mixed with the flow of the entire PVSC system and travelled the remaining distance to the treatment plant. After treatment, liquid residue from the treatment process was transported into a disbursement field in upper New York Bay while residual sludges were disposed of in the Atlantic Ocean.

The time period covered by the Indictment marks the beginning of an era of transition in the law and in attitudes as to the transportation, storage, treatment, and disposal of waste in the United States. It was on May 1, 1978 that NJDEP instituted a waste "manifest" system for reporting the receipt, transportation and disposal of certain chemical wastes. On May 9, 1978, SCP received a temporary operating authorization from NJDEP, for the operation of a special waste facility for transfer, storage, processing, reclamation, recovery, blending, and treatment of solid wastes.

Count One of the Indictment charged the defendants with conspiracy (18 U.S.C. §371) to violate the Mail Fraud statute (18 U.S.C. §1341) for the purpose of executing a fraudulent scheme and artifice regarding the treatment, recovery and disposal of industrial chemical waste in

New Jersey. Count One also alleged that defendants: (1) unlawfully discharged industrial chemical waste into the Hudson Bay through PVSC's sewerage treatment facility; (2) caused an independent hauler, Henry Heflich, and his companies to unlawfully transport and dump industrial chemical wastes at Lone Pine Landfill ("Lone Pine"), Freehold, New Jersey, from January through May 1978; (3) concealed unlawful dumping at Lone Pine by failing to issue Special Waste Manifests to NJDEP pursuant to the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq.; and (4) concealed the unlawful use of the PVSC system by submitting false and fraudulent Special Waste Manifests to NJDEP. The remaining twenty counts of the Indictment charged the defendants with substantive violations of Mail Fraud (18 U.S.C. §§1341 and 1342).

The Federal Indictment was the second indictment returned against Sigmond and the other defendants concerning the same activity. In 1979, a New Jersey State Grand Jury returned an indictment (No. 51-78-2) against SCP and Case, Barnes and Sigmond for illegally discharging chemical waste into PVSC's system between June 1977 and July 13, 1978. The State indictment against the defendants was ultimately dismissed in its entirety.

During the State investigation, evidence was seized from SCP'S Newark facility pursuant to search warrants issued by a State court judge. (App. N). Various corporate papers, records, samples of liquid waste, photographs and other items were taken. Defendants moved to suppress the evidence obtained on the grounds that (1) affidavits in support of the search warrants failed to establish probable cause to find illegal dumping and



(2) police misconduct by the affiants in that relevant information was withheld from the issuing judge. By Order dated April 3, 1981, the Honorable William H. Walls, J.S.C., granted the motion to suppress on the ground that the affidavits failed to establish probable cause as to any illegal activity without reaching the issue of the affiants' misconduct. (App. G).

The evidence suppressed in the State action was later turned over to the United States Attorney's Office for use in the present case. (App. I.) Judge Debevoise denied appellants' pretrial motions for suppression of evidence obtained under the defective State-issued warrants. (App. E).

In the federal action, the scheme and artifice charged in the Indictment upon which the mail fraud charges were based was the illegal disposal of chemical



waste. To defend against these charges, prior to trial the defendants moved for an order requiring the government to furnish information through a Bill of Particulars regarding the volume and chemical composition of the materials alleged to have been disposed of by SCP. (App. O). Judge Debevoise denied this request. (App. C & E). Throughout the course of the trial, the trial court improperly allowed evidence to be introduced as to materials allegedly received by SCP from generators without requiring proof by the government as to the chemical composition of the specific materials, as to whether or not the materials were hazardous, and, therefore, whether the method of ultimate disposal was illegal. (T. Vol. 1 p. 182 L. 14 to p. 186 L. 10; T. Vol. 1 p. 199 L. 1 to p. 200 L. 16; T. Vol. 1 p. 221 L. 10 to p. 223 L. 9; T. Vol. 2 p. 286 L. 5 to p. 289 L. 11; T. Vol. 2 p. 292 L. 16 to p.

293 L. 3; T. Vol. 5 p. 1137 L. 17 to p. 1140 L. 22.)

The Indictment in this matter charged the defendants with a single scheme to defraud regarding the transportation, treatment, recovery and disposal of industrial chemical wastes. At trial, however, the government offered proof of two separate schemes. One scheme alleged the disposal of hazardous wastes into the PVSC system and the second scheme alleged the disposal of hazardous wastes at the Lone Pine Landfill. No evidence was presented by the government at trial to implicate Sigmond in the alleged scheme to dispose of hazardous wastes at the Lone Pine Landfill.

During the federal trial Judge Debevoise quashed a subpoena which had been served on the Chief Counsel and Staff Director of the Subcommittee on Oversight and Investigation to the House Committee

on Energy, seeking certain documents.

(App. H). The original subpoena was narrowed during oral argument to cover reports of interviews of employees of Lone Pine Corporation and of employees of Henry Heflich with respect to the subject matter of the federal Indictment, who were, in the words of the Subcommittee, "knowledgeable." The Subcommittee had interviewed witnesses concerning activities at Lone Pine, the identities of the people or entities using Lone Pine, and the materials being disposed of there. These subpoenaed documents were relevant in that defendants may not have been identified as using Lone Pine in an illegal manner which would have been exculpatory. Judge Debevoise denied appellants' request to enforce the subpoena.

Finally, the trial court erred in instructions to the jury. First, a charge entitled "Absence of Witness", which drew

the jury's attention to appellants' decision not to testify, was given. (T. Vol. 26 p. 5065-5066). Secondly, a charge on defendants' Theory of the Case concerning the essential elements of the offenses charged was not given. Lastly, defendants' State of the Art charge with respect to developments and technological advances which occurred between the time period of the activities alleged in the Indictment and the time of trial was not given.

#### REASONS FOR ALLOWANCE OF THE WRIT

- I. ALL EVIDENCE ILLEGALLY OBTAINED BY THE STATE OF NEW JERSEY AND SUBSEQUENTLY TURNED OVER TO THE FEDERAL GOVERNMENT SHOULD HAVE BEEN SUPPRESSED BY THE TRIAL COURT.

The Fourth Amendment to the United States Constitution protects all persons against unreasonable searches and seizures, requiring searches and seizures to be made pursuant to warrants issued upon probable cause. U.S.C.A. Const.

Amend. 4. This Court has long held that a person's remedy for an unlawful search and seizure is to have the unlawfully obtained evidence, as well as the fruits of all such evidence, excluded from any criminal trial against him. Alderman v. United States, 394 U.S. 165, 171, reh. den. 394 U.S. 939 (1969). See also Rules 12 and 41 of the Federal Rules of Criminal Procedure.

This Court has firmly established that the exclusionary rule must be applied to prevent evidence obtained by state officers in an unreasonable search and seizure from being admitted against a defendant in a federal criminal trial. In Elkins v. United States, 364 U.S. 206 (1960), this Court ruled that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's constitutional rights, is inadmissible in

a federal criminal trial. 364 U.S. 223-224. Accord, Rios v. United States, 364 U.S. 253 (1960). See also United States v. Janis, 428 U.S. 433, reh. den. 429 U.S. 874 (1976).

The facts of the present case are on point with those of Elkins v. United States, supra. Evidence was seized from SCP's Newark facility by the State of New Jersey pursuant to three search warrants issued by the New Jersey courts in the course of the state investigation. The New Jersey courts, finding that the warrants were not based on probable cause, suppressed the use of all of the evidence. (App. G).

During the course of the state proceedings, the federal government obtained the seized materials from the State for use in these federal criminal proceedings. Although a grand jury subpoena was the vehicle used by the U.S.

Attorney for obtaining these materials, cooperation between state and federal officials clearly existed as evidenced by the testimony of New Jersey Deputy Attorney General, Gregory Sakowicz before the House of Representatives Subcommittee on Oversight and Investigations, Committee on Energy and Commerce (App. I). Mr. Sakowicz testified that the state investigation of Lone Pine began as a result of information obtained by the State during the course of the July 13, 1978 search of SCP's facility. (App.I at p. I-2 to I-6.) Mr. Sakowicz further testified that the State decided to close its criminal file on the matter due to available manpower resources and assign an investigator to work with the Office of the U.S. Attorney to develop a case. (App. I at p. I-22 to I-26.)

Prior to the trial in this matter, the defendants moved to suppress all of



ernment from the State of New Jersey as well as the fruits of that evidence, and for a hearing thereon. The trial court found that the rule in Elkins clearly prevented evidence obtained by state officers in an unreasonable search and seizure from being used in a federal criminal trial. (App. J p. 5 L. 13 to p. 5 L. 18). The court further found that as the defendants were directors, officers and owners of a closely held corporation, they had standing to challenge the searches of SCP's offices. (App. J p. 5 L. 24 to p. 6 L. 5). The court, however, denied the defendants' motion, finding that probable cause existed for the issuance of the warrants. (App. J p. 9 L. 1 to p. 9 L. 9). The court further found that even if the materials had been illegally seized by the state officers, they were unaffected by any taint as the federal government had obtained the



materials "through the lawful use of the Federal Grand Jury Process" (App. J p. 9 L. 10 to p. 9117). As set forth below, the trial court erred in denying this motion.

- A. AS THE SEARCH WARRANTS ISSUED BY THE NEW JERSEY COURTS WERE NOT BASED UPON PROBABLE CAUSE, THE SEARCHES AND SEIZURES WERE UNCONSTITUTIONAL.

The establishment of probable cause is the basis for determining the constitutionality of any search and seizure. USCA Const. Amend 4; see also Fed. R. Crim Pro. 41(c). The traditional standard used for determining probable cause is whether the evidence "would persuade a man of reasonable caution to believe that an offense was or is being committed and that evidence of assistance in securing an apprehension or conviction of the perpetrator likely would be found in the places to be searched." United States v. Nilsen, 482 F. Supp. 1335, 1338 (D.N.J. 1980), see

also Carroll v. United States, 267 U.S. 132 (1924). For purposes of a motion to suppress, the reviewing court can only consider the facts set forth in the affidavit furnished to support the application for the search warrant in deciding whether probable cause for the issuance of the warrant existed. Aguilar v. Texas, 378 U.S. 108, 109 n. 1 (1964).

In Spinelli v. United States, 393 U.S. 410, 414 (1969), this Court made it clear that probable cause cannot be based upon mere assertions of only innocent-seeming activity and data or upon unsupported statements of suspicion.

In the present case, the facts contained in the affidavits furnished in support of the search warrants (App. K, L & M) were insufficient to find probable cause of criminal activity. A reading of the affidavits reveals that the affiants made only eight observations as to the

activities at SCP's Newark facility as follows:

1. The sounds of gushing liquids through the manhole. (App. M)
2. Chemical odors from the manhole. (App K & M)
3. Tanker truck on SCP's premises. (App. K & L)
4. Hose from tanker truck to building. (App. L)
5. Gas mask on one worker on premises. (App. K).
6. Numerous 55 gallon drums on premises. (App. K).
7. Hose in building. (App. K)
8. Water running into sewer. (App. K).

Whether taken as a whole or looked at individually, the only conclusion that can be drawn from these eight observations is that the activities were innocent activities, consistent with a lawful chemical recovery business and did not give rise to probable cause of criminal activity.

Unquestionably, SCP was in the chemical

disposal and processing business at the time the warrants were issued. The State of New Jersey had issued permits to SCP to deal with chemicals. In fact, in his affidavit Richard Childs specifically refers to the operating authorizations that were issued by the NJDEP to SCP. (App. K.) These operating authorizations allowed SCP to transfer, store, reprocess, reclaim, recover, blend and treat chemical wastes. Each and every one of the observations made and contained in the affidavits were consistent with the lawful operation of a chemical treatment plant and did not indicate anything inconsistent with legitimate business activity.

As the New Jersey courts found, these affidavits failed to establish probable cause of criminal activity at SCP's Newark facility. The searches, therefore, were unconstitutional and the trial court should have granted the motion for sup-

pression or, at a minimum, ordered a hearing on the issue.

B. SUPPRESSION SHOULD HAVE BEEN GRANTED BECAUSE THE INFORMATION CONTAINED IN THE AFFIDAVITS WAS STALE.

A law enforcement officer's request for a search warrant implies by its very nature that the items sought are presently at the designated location. A finding of probable cause to search requires a determination that certain objects are probably connected with criminal activity and that those objects can currently be found at a particularly described place. In issuing the search warrant, the issuing judge must not only find that the information established probable cause, but he must also determine whether the information presented in the affidavit was current or whether it had grown stale. Sgro v. U.S., 287 U.S. 206 (1932). The likelihood that the evidence is no longer on the premises

increases with the passage of time between the gaining of facts constituting probable cause and the issuance of the warrant.

When a court finds that the information in the affidavit is not current, it must exclude the evidence seized pursuant to the search. Rugendorf v. U.S., 376 U.S. 528, reh. den. 337 U.S. 940 (1964); Berger v. U.S., 388 U.S. 41 (1967).

It is conceded that the question of staleness does not merely depend on the dates and times specified in the affidavits but will also depend on the nature of the unlawful activity that has been alleged. U.S. v. Harris, 482 F. 2d 1115 (3rd Cir. 1973). In U.S. v. Johnson, 461 F. 2d 285, 287 (10th Cir. 1972) the court noted that where the affidavit recites an isolated violation it can be implied that probable cause dwindles quickly with the passage of time but where the affidavit recites a continuous course

of conduct the passage of time is less significant.

In the present case, a reading of the three affidavits (App. K, L & M) furnished in connection with the search warrant issued on July 10, 1978 (App. N) indicates that no information contained in any of them was less than 18 days old when this warrant was issued. The affidavit of Russo (App. M) and the affidavit of Childs (App. L) refer solely to observations made on June 13th and June 14th, 1978, nearly one month before the search warrant was issued. The Affidavit of Smith (App. K) refers to observations made on June 22, 1978 and observations made between January and April 1978.

The affidavits submitted in the present case related to only several isolated incidents. No showing was made of any pattern which developed as a result of these isolated incidents. Both the affi-



davits of Childs (App. L) and Russo (App. M) relate to an incident taking no more than several minutes during their surveillance of June 13th and 14th, 1978. The affidavit of Smith (App. K) refers to observations made by him on June 22, 1978. These observations made on two occasions more than a week apart clearly did not establish any type of pattern or course of conduct by SCP. The affidavit of Smith also contained observations made between January 26, 1978 and April 26, 1978. However, these observations were well over two months old at the time of the issuance of the warrants.

In its opinion denying the motion to suppress, the trial court failed to address the issue of staleness. (App. J p. 5 L. 9 to p. 10 L. 12). Any information contained in the search warrant affidavits which might have given rise to probable cause was stale. The trial



court, therefore, should have held the issuance of the search warrants unconstitutional.

C. USE OF A GRAND JURY SUBPOENA DID NOT CURE THE TAINT OF THE ILLEGAL SEARCH AND SEIZURE BY THE STATE OFFICERS.

In his opinion, the trial judge found that even if the search warrant affidavits were not supported by probable cause, the silver platter doctrine proscribed by the Supreme Court in Elkins v. United States, supra, was not applicable as the materials had been obtained by the federal government by grand jury subpoena. (App. J p. 9 L. 10 to p. 9 L. 21). As set forth below, the use of a grand jury subpoena did not cure the taint of the illegal searches and seizures by the state officers and, therefore, the rule under Elkins should have been applied.

This Court has found that the use of a grand jury subpoena is not a seizure

within the meaning of the Fourth Amendment and, therefore, the exclusionary rule does not apply to grand jury proceedings.

United States v. Dionisio, 410 U.S. 1, 76 (1973); United States v. Calandra, 414 U.S. 338, 572 (1974). In United States v. Calandra, supra, the Court found that a suppression hearing would serve to delay and disrupt the grand jury in its investigative and accusatorial functions. The Court noted that the right to invoke the exclusionary rule is "reserved for the trial on the merits" and cannot be raised before the grand jury. 414 U.S. 349. Clearly, the mere fact that during the course of a grand jury proceeding a defendant cannot seek to suppress evidence obtained in violation of his Fourth Amendment rights, does not preclude him from later seeking to suppress that evidence at the time of trial.

In the present case, the use of the grand jury subpoena to obtain the materials seized by the State cannot be found to have prevented Sigmond from seeking to suppress those materials at the time of trial under the rule in Elkins, supra. Clearly, under United States v. Calandra, supra, Sigmond's right to move to suppress under the Fourth Amendment was reserved for trial and could not be invoked at the time the grand jury subpoena was served.

Additionally, in his opinion, the trial court noted that counsel for SCP had consented to the production of materials pursuant to the federal grand jury subpoena. (App. J p. 9 L. 21 to p. 10 L. 4) This consent, however, cannot be found to have affected Sigmond's Fourth Amendment right to move to suppress. The consent was given by counsel for the corporation. No attorney-client relationship

existed between the attorney and Sigmond. Therefore, there was no waiver of rights by Sigmond.

More importantly, the trial court ignores the fact that the materials illegally seized by state officers, and the fruits thereof, had been turned over by the state officers to the federal authorities prior to the issuance of the federal grand jury subpoena. Cooperation clearly preceded the issuance of the grand jury subpoena. (App. I.)

Cooperation between state and federal officials took place on April 19, 1981 (App. I at 125); the grand jury subpoena was issued on June 25, 1981 (App. S).

Therefore, the trial court should have granted the motion to suppress or, at a minimum, ordered an evidentiary hearing.

II. THE ADMISSION OF EVIDENCE AS TO MATERIALS ALLEGEDLY RECEIVED BY SCP FROM GENERATORS WITHOUT PROOF OF THE CHEMICAL COMPOSITION OF THE SPECIFIC MATERIALS CONSTITUTED

SUBSTANTIAL ERROR DENYING SIGMOND  
HIS RIGHT TO A FAIR TRIAL.

This Court has held that a defendant is "entitled to be tried upon competent evidence, and only for the offense charged." Boyd v. United States, 142 U.S. 450 (1891). Where evidence has been improperly admitted, the test for ordering a new trial is not whether sufficient evidence upon which the defendant could be convicted was properly admitted, but rather whether any reasonable possibility existed that the evidence improperly admitted might have contributed to the conviction. Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963). Accord Luttrell v. United States, 320 F. 2d 462, 466-467 (5th Cir. 1963). See also United States v. Dixon, 658 F. 2d 181 (3rd Cir. 1981) where the district court had found that improper lines of questioning had warranted a new trial. In Chapman v. California, 386 U.S.

18, 23-24 reh. den. 386 U.S. 987 (1967), the Court found that the Fahy decision required the party claiming harmless error to prove the error to have been harmless beyond a reasonable doubt.

In the present case, review of the Indictment reveals that the alleged scheme and artifice upon which the mail fraud charges were based was the illegal disposal of chemical wastes. Throughout the course of the trial, the trial court improperly allowed evidence to be introduced as to materials allegedly received by SCP from generators without requiring proof by the government as to the chemical composition of the specific materials, as to whether or not the materials were hazardous, and, therefore, whether the method of ultimate disposal was illegal. The defense contended through its objections that as the defendants were charged with a mail fraud based upon the

illegal disposition of waste materials, it was necessary for the government to prove the chemical composition of the specific materials, thus establishing whether they were indeed hazardous and disposed of illegally. (T. Vol. 1 p. 182 L. 14 to p. 186 L. 10; T. Vol. 1 p. 199 L. 1 to p. 200 L. 16; T. Vol. 1 p. 221 L. 10 to p. 223 L. 9; T. Vol. 2 p. 286 L. 5 to p. 289 L. 11; T. Vol. 2 p. 292 L. 16 to p. 293 L. 3; T. Vol. 5 p. 1137 L. 17 to p. 1140 L. 22).

Sigmond suffered substantial prejudice by the improper admission of this evidence, denying him his right to a fair trial. As the entire case centered around the receipt and disposal of waste material found at a minimum, that this evidence might have contributed to the Sigmond's conviction. To insure Sigmond's his right to a fair trial, his conviction must be reversed and this matter remanded for a new trial.



In addition, the evidence admitted was insufficient to find that the defendants illegally disposed of the waste materials received by SCP from the generators.

The only evidence admitted as to the nature or quality of materials allegedly disposed of by SCP at the Lone Pine Landfill was the testimony of Carmine C. Trezza, a former employee of SCP. Mr. Trezza testified that SCP sent drums containing kolene to the Lone Pine Landfill. (T. Vol. 26 p. 5120 L. 24 to p. 5122 L. 17). No scientific analysis was presented by the government, however, to prove that these drums did in fact contain kolene.

No specific evidence was admitted as to the nature and quality of the materials allegedly disposed of by SCP into the PSVC system. Although evidence was presented by some generators as to what their waste



products consisted of generally, no evidence was presented as to the chemical composition of the specific materials allegedly received by SCP. In addition, no evidence was presented to prove that the materials received by SCP were identical to the materials disposed of by SCP. On the contrary, the testimony at trial established that all materials disposed of into the PVSC system were diluted with water. (T. Vol. 20 p. 4162 L. 16 to p. 4163 L. 8). No evidence was presented to prove that the materials allegedly disposed of into the PVSC system, when diluted with water, violated the PVSC regulations or were toxic.

A conviction under the mail fraud statute requires proof by the government of specific intent to defraud. See United States v. Pearlstein, 576 F.2d 531, 537 (3rd Cir. 1978); United States v. Klein, 515 F.2d 751, 754 (3rd Cir. 1975). With-

out proof of the chemical composition of the materials allegedly disposed of by SCP, the evidence was insufficient to show that the defendants intended to illegally dispose of the materials and thereby defraud the NJDEP, the PVSC and/or the generators as charged in the indictment. No scheme to defraud can be found if the materials were legally disposed of by SCP. As the government failed to prove the nature and quality of the materials allegedly disposed of by SCP, the evidence was insufficient to convict Sigmond and therefore, the conviction should be reversed and this matter remanded for a new trial.

III. THE TRIAL COURT ERRED IN REFUSING TO COMPEL DISCOVERY BY THE GOVERNMENT AS TO THE VOLUME AND CHEMICAL COMPOSITION OF MATERIALS ALLEGEDLY RECEIVED BY SCP FROM GENERATORS.

Under Rule 7(f) of the Federal Rules of Criminal Procedure, the courts have the

authority to direct the filing of a bill of particulars. Although the authority under the rule is discretionary, the courts have found that the 1966 amendment to Rule 7(f), which eliminated the previous requirement that a defendant show cause for obtaining a bill of particulars, was intended to encourage the courts to take a more liberal attitude towards the granting of bills of particulars. See United States v. Addonizio, 451 F.2d 49, 64 (3rd Cir. 1972), cert. den. 405 U.S. 936 (1972), reh. den. 405 U.S. 1048 (1972).

In the present case, prior to trial, the defendants moved for an order requiring the government to furnish a bill of particulars. (App. O). Bill of Particulars Numbers 2, 3, 5 and 6 sought information regarding the volume and chemical composition of the materials alleged to have been disposed of by SCP. In his

opinion filed on November 16, 1982, (App. C), Judge Debevoise denied this request, finding that the records made available by the government provided the defendants "with all that they need to prepare their defense in this regard." (App. C p. 5) The records made available by the government failed to inform the defendants of either the volume or chemical composition of the materials alleged to have been disposed of by SCP. As set forth in Part II above, the volume and nature of the materials allegedly disposed of were central to the charges. The failure to require discovery of these matters substantially prejudiced Sigmond in the preparation of his defense. The indictment was too vague and indefinite for Sigmond to prepare his defense and avoid surprise at trial. The trial court should have ordered the government to answer the bill of particulars.

IV. SIGMOND SUFFERED SUBSTANTIAL PREJUDICE FROM THE VARIANCE BETWEEN THE OFFENSES CHARGED IN THE INDICTMENT AND THE PROOF OFFERED AT TRIAL AND, THEREFORE, JUDGMENT OF ACQUITTAL SHOULD BE ENTERED.

In the prosecution of a mail fraud charge, the courts have found that it is error for the government to charge a single scheme and then offer evidence of two or more schemes at trial. United States v. Camiel, 689 F. 2d 31 (3rd Cir. 1982). In Camiel, supra at p. 35, the court found that the two-pronged test of Kotteakos v. United States, 328 U.S. 750 (1946) controlled to determine whether the variance in a particular case was sufficient to justify a reversal, i.e. (1) whether there was variance between the indictment and the proof and (2) whether the variance prejudiced some substantial right of the defendant.

In Camiel, supra, the court found that where multiple schemes were involved,

but the government failed to implicate all defendants in each scheme, substantial prejudice resulted to one defendant from the spillover effects caused by the introduction of evidence against another defendant. 689 F.2d 38. The court further found that the only appropriate remedy was the grant of a judgment of acquittal as the indictment itself was defective. 689 F.2d 39-40.

In the present case, the Indictment charged the defendants with a single scheme to defraud. At trial, however, the government offered proof of two separate schemes. One scheme alleged the disposal of hazardous wastes into the PVSC system and the second scheme alleged the disposal of hazardous wastes at Lone Pine.

No evidence was presented by the government which could be found to implicate Sigmond in the alleged scheme to dispose of hazardous wastes at Lone

Pine. Henry Heflich testified that he only discussed Lone Pine with Case and Barnes, (T. Vol. 5 p. 1034 L. 14 to p. 103 L. 20), and similarly that he discussed the manifests with only Case and Barnes, (T. Vol. 5 p. 1048 L. 3 to p. 1051 L. 18). Mr. Heflich testified that he was briefly introduced to Mr. Sigmond on one occasion at the Newark facility, (T. Vol. 5 p. 1039 L. 15 to p. 1040 L. 8), and that he, his attorney and his consultant had met with Mr. Sigmond and Mr. Case after SCP had stopped using Heflich's services to discuss SCP's payment of Heflich's bill. (T. Vol. 5 p. 1131 L. 4 to p. 1131 L. 12). George Borden testified that the only person he had met from SCP was Mr. Case. (T. Vol. 7 p. 1519 L. 11 to p. 1519 L. 14) Mr. Borden did not offer any testimony which could implicate Mr. Sigmond in the alleged scheme to dispose of hazardous wastes at Lone Pine. No



other evidence was offered by the government to implicate Mr. Sigmond in this alleged scheme.

The government's offer of proof as to two alleged schemes rather than one as charged in the Indictment constituted an impermissible variance. Although no evidence was presented by the government to implicate Sigmond in the alleged scheme to dispose of hazardous wastes at Lone Pine, Sigmond was convicted on counts which related solely to Lone Pine (i.e. Counts 8, 9 and 10). Sigmond, therefore, suffered substantial prejudice from the spillover effect of the evidence admitted as to the alleged Lone Pine scheme, and an acquittal should be granted.

V. THE COURT OF APPEALS ERRED IN REFUSING TO ORDER THE TRIAL COURT TO REVIEW THE SENTENCE IMPOSED ON SIGMOND.

Under Rule 35 of the Federal Rules of Criminal Procedure, a trial court can



reduce a sentence following a mandate by an appellate court that the sentence be reviewed. An appellate court may review a sentence for the presence of illegality or gross abuse of discretion, United States v. Yates, 553 F.2d 502 (5th Cir. 1977) or for a clear abuse of discretion. United States v. Biskoff, 531 F.2d 182 (3rd Cir. 1976); United States v. Ligari, 658 F.2d 130 (3rd Cir. 1981); United States v. Hopkins, 531 F. 2d 576 (D.C. Cir. 1976). See also United States v. Yates, 356 U.S. 363 (1958).

A. The Sentence Imposed On Sigmond Should Be Reviewed Due To Disparity In Sentencing.

Where facts point to the conclusion that the district court has arbitrarily singled out a minor defendant for a more severe sentence than that imposed on a codefendant, the appellate court will correct the disparity. See United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

See also United States v. Robinson, 426 F. Supp. 266 (S.D.N.Y. 1976).

Disparity in sentencing existed in the present case. The evidence presented at trial clearly indicated that Sigmond was less culpable than his codefendants. The government presented less evidence to implicate Sigmond than it did as to Case and Barnes. This is clearly established from the fact that Sigmond was convicted on fewer counts than his codefendants. (App. P) Despite this fact, the sentence imposed on Sigmond (App. F p. 45 L. 25 to p. 46 L. 10) was one year higher than that imposed on Case (App. F p. 49 L. 8 to p. 49 L. 17) and two years higher than that imposed on Barnes (App. F p. 50 L. 8 to p. 51 L. 2).

The trial court appeared to base these disproportionate sentences, in part, upon the parties' positions in the corporation. (App. F p. 47 L. 14 to p.

47L16; p. 48 L. 25 to p. 49 L. 1; p. 50 L. 6 to p. 50 L. 7) It appears that Sigmond was given a harsher sentence merely because of his position as president of the corporation; all three defendants, however, were officers and owners of the corporation and all three were responsible for the corporation's actions. The mere fact of Sigmond's title in the corporation should not have been used to increase the sentence against him and, therefore, the sentence should be reviewed.

B. The Sentence Imposed On Sigmond Should Be Reviewed Due To Discrimination In Sentencing.

The federal courts have recognized that discrimination exists where a member of one race, (whether black or white) is subjected, because of his race, to a greater or different punishment than a member of another race. Maxwell v. Bishop, 398 F.2d 138, (8th Cir. 1968) judgment vacated on another ground, 398

U.S. 262 (1970). See also Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968) and United States v. York, 288 F. Supp. 955 (D. Conn. 1968).

At sentencing in the present case, the trial judge pointed out that codefendant Barnes was black and born in the south before civil rights activities had changed that part of our land (App. F p. 49 L. 18 to p. 49 L. 23) and sentenced Barnes to a prison term two years less than that imposed upon Sigmond. It is evident that racial factors contributed to the court imposing a sentence upon Barnes which was two years less than that imposed upon Sigmond. Id. This racial discrimination in sentencing was clearly improper and an abuse of the trial court's discretion and, therefore, the sentence imposed upon Sigmond should be reviewed.

VI. SIGMOND'S CONVICTION SHOULD BE  
REVERSED AS THE JURY DREW  
CONSTITUTIONALLY IMPERMISSIBLE

INFERENCES FROM THE DEFENDANTS'  
DECISIONS NOT TO TESTIFY.

- A. Sigmond Was Denied His Fifth Amendment Right To Remain Silent As A Result Of References Made By The Government.

The Fifth Amendment affords each citizen the privilege of remaining silent without adverse inferences attaching. A defendant's election not to testify or explain evidence against him cannot be considered as tending to indicate the truth of the evidence nor may any inference be drawn therefrom by the jury or through the comments of the prosecutor or instructions of the court. Carter v. Kentucky, 450 U.S. 288, 305 (1981); Government of the Virgin Islands v. Bell, 392 F. 2d 207, 208 (3rd Cir. 1968). See also Griffin v. California, 380 U.S. 609, 615 (1965).

In the present case, Sigmond, Case and Barnes each exercised his right to remain silent and did not testify at

trial. In its rebuttal to defense summations, the government made references with respect to the defendants' elections not to testify or call witness. (App. Q) The defense objected to these references and moved for a mistrial, which motion was denied. (T. Vol. 26 p. 5034 L. 19 to p. 5035 L. 12, p. 5036 L. 6 to p. 5036 L. 22).

The government comment on the election of the defense not to call witnesses or testify violated Sigmond's Fifth Amendment rights.

B. Sigmond Was Denied His Fifth Amendment Right To Remain Silent As A Result Of The "Absence Of Witness" Charge Given By The Trial Court.

Following summation, the Government requested a charge concerning "Absence of Witnesses" (T. Vol. 26 p. 5040 L. 2 to p. 5040 L. 5). Defendants' objection to any such charge was rejected, (T. Vol. 26 p. 5040 L. 17 to p. 5041 L. 9), and the jury was instructed as follows:

If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness may give rise to an inference that his testimony would be unfavorable to that party. However, no such conclusion should be drawn by you with regard to a witness who was equally available to both parties, or where the witness' testimony would be merely cumulative. The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. (T. Vol. 26 p. 5065 L. 18 to p. 5066 L. 5) (Emphasis added).

The defense objected that the charge may have left an adverse inference in the minds of the jurors from the fact that the defendants themselves did not take the stand. (T. Vol. 26 p. 5114 L. 1 to p. 5115 L. 3).

In addition to reading the charge to the jury, the charge was typed up and provided to the jury during their deliberations, over the objection of



defense counsel. (T. Vol. 26 p. 5117 L. 15 to p. 5117 L. 16). The typed charge was headed "ABSENCE OF WITNESS". This heading was especially prejudicial because the court did not differentiate in the charge nor explain separately to the jury that a distinction should be made between a witness generally and defendants.

Even assuming the "ABSENCE OF WITNESS" charge was not inappropriate per se, the court had an affirmative duty under the circumstances to give a curative cautionary instruction whether requested by defendants or not to protect defendants' rights with regard to the privilege against self-incrimination. See Lakeside v. Oregon, 435 U.S. 333, 339-341 (1978). See also Carter v. Kentucky, supra at 450 U.S. 301 n. 17, where the Court noted that "more harm may flow from the lack of guidance to the jury . . . than from reasonable comment upon the exercise of the privilege."



The failure to give a curative instruction violated Sigmond's Fifth Amendment rights.

- C. The Jurors' Statements Recorded In The Walder Affidavit Clearly Demonstrate That The Jurors Improperly Considered The Defendants' Failure To Take The Stand Contrary To The Fifth Amendment.

Following the jury's verdict, while leaving the courthouse, Justin P. Walder, counsel for co-defendant Case, was approached by several jurors who commented on the defendants' failure to testify. A majority stated that they considered the failure of the defendants to testify in their deliberations and that it affected their verdict. (See Affidavit of Justin P. Walder set forth in App. S). The statements were made to Mr. Walder without solicitation and immediately following the trial and are within the hearsay exception for present sense impressions. Fed R. Evid. 803(1); see also Zenith Radio

Corporation v. Matsushita Electric

Industrial Company, 505 F.Supp. 1190, 1228  
n. 48 (E.D.Pa. 1980).

Fed. R. Evid. 606(b) provides

". . . a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. . . ." This exception to the general rule that jurors cannot impeach their own verdict is necessary to redress violations of constitutional rights such as those at issue here. See United States ex rel Owen v. McMann, 435 F. 2d 813, 815 (2nd Cir. 1970), where the court found that consideration of facts outside the record by the jury held such probable prejudice to the defendant as to render the verdict inherently lacking in due process. See also United States v. Vento, 533 F. 2d 838, 389 (3rd Cir. 1976);

United States v. Bangariol, 665 F. 2d 877, 885 (9th Cir. 1981); United States v. Vasquez, 597 F. 2d 192, 193 (9th Cir. 1970); United States v. Renteria, 625 F. 2d 1279, 1284 (5th Cir. 1980). In Paterson v. Colorado, 205 U.S. 454, 462 (1907), Justice Holmes noted that a jury is to reach its verdict "only by evidence and argument in open court and not by any outside influence, whether of private talk or public print." (Emphasis supplied).

Since the jury is barred by the Fifth Amendment from considering the defendants' election not to take the stand, the defendants' decision was not evidence. Such consideration was consideration of extrinsic evidence. Sigmond submits that any inference drawn from not testifying would, in effect, be drawn from extrinsic evidence not properly before the jury. The jury improperly considered the defendants' election not to testify. (App.

R.) Sigmond was deprived of his constitutional rights to a fair trial and to remain silent as a result of the jurors' consideration of this extraneous, prejudicial information.

VII. SIGMOND WAS DENIED HIS FIFTH AND SIXTH AMENDMENT RIGHTS AS A RESULT OF THE TRIAL COURT'S FAILURE TO ENFORCE THE SUBPOENA DUCES TECUM SERVED ON THE CHIEF COUNSEL AND STAFF DIRECTOR OF THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATION.

Defendants served a subpoena on the Chief Counsel and Staff Director of the Subcommittee on Oversight and Investigation to the House Committee on Energy, seeking certain records (App. H). The original subpoena was narrowed to cover any interview reports of employees of Lone Pine Corporation, Henry Heflich or any drivers from Heflich's companies, and generators whose materials went to Lone Pine (T. Vol. 18 p. 3689 L. 13 to p. 3689 L. 17). The Subcommittee refused to

produce the records, relying on a qualified testimonial privilege.

The necessity and importance of the requested material was due to its relevance concerning the substance of the charges, as well as the credibility of government witnesses. The interview reports sought were those of persons identified by the Subcommittee as "knowledgeable". These documents were specifically relevant to whether or not the defendants had knowledge of wastes being taken to Lone Pine. Defendants could not demonstrate a more specific need because they were unaware of what specifics the documents would reveal. This is a common problem encountered in cases where the documents being sought are in the possession of another and have never been fully disclosed.

Additionally, the documents related to critical time periods. The Indictment

contended wastes were delivered after May 1, 1978 to Lone Pine from SCP without Special Waste Manifests. The only testimony on that point was from Heflich. No one from Lone Pine, including Borden, related anything to the time period of May 1 and after. Therefore, the statements of Lone Pine employees who worked during the same time period were material and relevant to the defense. This was especially true since the employees could not be interviewed as they were never identified.

The Speech and Debate privilege is essentially a qualified "testimonial privilege." In In Re Grand Jury Investigation, 587 F. 2d 589-597 (3d Cir. 1978), Judge Gibbons analyzed Art. I, Section 6.1, of the Constitution and stated that to the extent that the clause creates a testimonial privilege it does so only for the limited purpose of protecting legisla-

tors and the legislative process from harassment. It was not designed to encourage confidences by maintaining secrecy. In In Re Grand Jury, supra, the court reviewed a subpoena for production of telephone records of a congressman which were in the possession of the House of Representatives. The Court stated that the records were largely not testimonial in nature and had to be produced.

The qualified testimonial privilege relied upon by the Subcommittee pales when weighed against the constitutional rights of the defendants to compulsory process and due process of law. The within subpoena sought documents which were non-testimonial as to any member of Congress or any staff member. Rather, the subpoena sought interview reports of various employees of Lone Pine Corporation, Heflich or his employees and generators using Lone Pine who the Subcommittee identified as



"knowledgeable" concerning Lone Pine activities. Further, the Subcommittee had already issued its report, and therefore, the materials requested need not have been kept confidential as indictments had already been returned.

In United States v. Nixon, 418 U.S. 683 (1974), the United States Supreme Court examined the issuance of subpoenas duces tecum pursuant to Fed. R. Crim. P. 17. The Nixon subpoena was issued by a special prosecutor for documents and tape recordings in the possession of the President. In analyzing the subpoena power, the Court cited Bowman Dairy co. v. United States, 341 U.S. 214, 221 (1951), and again agreed that the subpoena power could be exercised pursuant to the Fifth and Sixth Amendments to produce "any document or other materials admissible as evidence" at trial. The Nixon Court recognized that an applicant for a subpoena need only show



relevancy, admissibility and specificity in obtaining documents from the subpoenaed party. Id. at 700. In the absence of military, diplomatic or sensitive national security secrets, such materials should at least be turned over to the court for in camera inspection. Id. at 706.

In the present case the defendants' rights to due process of law and to the production of exculpatory evidence and evidence affecting credibility of witnesses are involved here. The Subcommittee was instrumental in initiating the charges against the defendants and held in its possession interview reports which were not available through any other source. Under these circumstances, the materials must be viewed in the context of Brady v. Maryland, 373 U.S. 83 (1963) and United States v. McCrane, 547 F. 2d 204 (3d Cir. 1976).

For the reasons set forth above, the trial court erred in refusing to enforce the subpoena. To protect and assure Sigmond's Fifth and Sixth Amendment rights, the verdict of the trial court should be vacated.

VIII. THE TRIAL COURT COMMITTED VARIOUS ERRORS RESPECTING THE SUPERVISION AND INSTRUCTION OF THE JURY WHICH INDIVIDUALLY AND COLLECTIVELY DENIED SIGMOND A FAIR TRIAL.

A. The Trial Court Erred In Refusing To Charge The Jury On Defendants' Theory Of The Case.

The trial court refused to give the defendants' requested "Theory of the Case" charge.

Trial courts are bound to give the substance of a requested instruction relating to any defense theory for which there is any foundation in the evidence. United States v. Blair, 456 F. 2d 514, 520 (3d Cir. 1972), United States v. Lowell, 490 F. Supp. 897, 906 (D.N.J. 1980). In the

present case, the defendants' defense was that they had no knowledge that Heflich and/or his companies were using Lone Pine for the unlawful disposal of industrial wastes and they had no knowledge that the facilities of the PVSC were used for the unlawful disposal of industrial wastes. Consequently, they could not have been knowingly and willfully involved in any scheme or artifice to defraud.

The court's failure to give defendants' theory of the case charge constitutes error and mandates reversal.

Government of the Virgin Islands v. John,  
447 F. 2d 69, 74 (3d Cir. 1971).

B. The Trial Court Erred In Refusing  
To Charge the Jury On The State Of  
The Art.

The trial court refused to give requested "State of the Art" charge. (T. Vol. 26 p. 5106 L. 25 to 5107L9). The refusal to charge was severely prejudicial to Sigmond and constituted plain error.

Fed. R. Crim. P. 52 (b). The failure to charge denied Sigmond his due process right to a fair trial.

The state of the art charge was requested to address the rapid technological advances and changes which occurred between the time period of acts alleged in the Indictment and the time of trial. The acts charged in the Indictment were alleged to have occurred between June 1977 and May 1978. The trial was held almost six years later in January and February 1983. The charge would have instructed the jury to consider the custom and practice in the industry at the time of the events in determining the innocence or culpability of an individual. An individual in the industry is to be held to the degree of skill and of knowledge of development in the art of the industry existing when the alleged acts occurred. Smith v. Minster Machine Co., 669 F. 2d

628, 632 (10th Cir. 1982).\*

The justification for applying a state of the art defense in this case relates to the requirement of intent. when dealing with a crime such as mail fraud, mens rea is an essential element; there must be intent to defraud. The state of the art charge proposed by defendants covered the standards and regulations in effect at the time the offenses were allegedly committed; it was therefore relevant as to the individual's state of mind at the time. Sigmond had no knowledge that Lone Pine or PVSC was being used for the unlawful disposal of wastes. Consequently, Sigmond could not have been knowingly and willfully involved

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\* See also Feldman v. Lederle Laboratories, 189 N.J. Super 424, 432-433 (App. Div. 1983), where the state of the art defense was permitted in ordinary products liability cases. The rationale for such a defense in a criminal case would appear even stranger where the defendant faces not only a pecuniary sanction, but a loss of freedom.

in any scheme or artifice which employed the United States mails to defraud the NJDEP, PVSC or specific generators in any substantive act of mail fraud charged in the Indictment.

Under the state of the art charge, the jury could have evaluated intent in light of the knowledge, skills and regulations of the industry at the time of the offense. Failure to give this charge, ignored the mens rea requirement, of the offense.

The cumulative effect of these errors requires that the verdict be vacated and that the appellants be granted a new trial.

## CONCLUSION

For the reasons set forth herein, it  
is respectfully requested that the  
Petition for Certiorari be granted.

Respectfully submitted,  
STEIN, BLIABLIAS,  
McGUIRE & PANTAGES  
Attorneys for Petitioner,  
Leif R. Sigmond

By: *Kenneth J. McGuire*  
Kenneth J. McGuire

Dated: June 12, 1984

In The  
**Supreme Court Of The United States**

OCTOBER TERM, 1983

83 - 2081

Supreme Court, U.S.  
**FILED**

**JUN 15 1984**

ALEXANDER L. STEVAS  
CLERK

**LEIF R. SIGMOND, Petitioner**

**vs.**

**UNITED STATES OF AMERICA**

**Appendix To  
Petition Of Leif R. Sigmond For Writ Of  
Certiorari To The United States Court  
Of Appeals For The Third Circuit**

**Kenneth J. McGuire, Esq.  
Stein, Bliablias, McGuire & Pantages  
Attorneys for Petitioner, Leif R. Sigmond  
11 Commerce Street  
Newark, New Jersey 07102  
(201) 622-3100**





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- Appendix D. Constitutional provisions, statutes and rules
- Appendix E. Order dated November 29, 1982
- Appendix F. Transcript of Proceedings - Sentence dated May 23, 1983
- Appendix G. Order dated April 3, 1981
- Appendix H. Subpoena dated January 11, 1983
- Appendix I. Transcript of Testimony of Gregory Sakowicz before Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce dated June 9, 1981.
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Appendix S. Federal Grand Jury Subpoena dated June 25, 1981.

UNITED STATES DEPARTMENT OF AGRICULTURE  
BUREAU OF PLANT INDUSTRY

WATER-PROOFING, PRESERVING, AND  
REPAIRING OF WOOD

BY  
J. H. HARRIS, JR.

WASHINGTON, D. C., 1917

REPRINTED FROM THE  
BUREAU OF PLANT INDUSTRY

REPORT OF THE  
BUREAU OF PLANT INDUSTRY

# APPENDIX A

The following is a list of the various methods of water-proofing, preserving, and repairing wood, as given in the report of the Bureau of Plant Industry, Department of Agriculture, Washington, D. C., 1917.

1. Water-proofing by painting with a mixture of linseed oil and turpentine.

2. Water-proofing by painting with a mixture of linseed oil and kerosene.

3. Water-proofing by painting with a mixture of linseed oil and varnish.

4. Water-proofing by painting with a mixture of linseed oil and shellac.

5. Water-proofing by painting with a mixture of linseed oil and rosin.

6. Water-proofing by painting with a mixture of linseed oil and asphaltum.

7. Water-proofing by painting with a mixture of linseed oil and pitch.

8. Water-proofing by painting with a mixture of linseed oil and resin.

9. Water-proofing by painting with a mixture of linseed oil and glue.

10. Water-proofing by painting with a mixture of linseed oil and casein.

11. Water-proofing by painting with a mixture of linseed oil and albumen.

12. Water-proofing by painting with a mixture of linseed oil and gelatin.

13. Water-proofing by painting with a mixture of linseed oil and starch.

14. Water-proofing by painting with a mixture of linseed oil and sugar.

15. Water-proofing by painting with a mixture of linseed oil and honey.

16. Water-proofing by painting with a mixture of linseed oil and molasses.

17. Water-proofing by painting with a mixture of linseed oil and syrup.

18. Water-proofing by painting with a mixture of linseed oil and oil.

19. Water-proofing by painting with a mixture of linseed oil and fat.

20. Water-proofing by painting with a mixture of linseed oil and wax.

21. Water-proofing by painting with a mixture of linseed oil and tallow.

22. Water-proofing by painting with a mixture of linseed oil and butter.

23. Water-proofing by painting with a mixture of linseed oil and lard.

24. Water-proofing by painting with a mixture of linseed oil and grease.

25. Water-proofing by painting with a mixture of linseed oil and soap.

26. Water-proofing by painting with a mixture of linseed oil and detergent.

27. Water-proofing by painting with a mixture of linseed oil and cleanser.

28. Water-proofing by painting with a mixture of linseed oil and polish.

29. Water-proofing by painting with a mixture of linseed oil and wax.

30. Water-proofing by painting with a mixture of linseed oil and tallow.

31. Water-proofing by painting with a mixture of linseed oil and butter.

32. Water-proofing by painting with a mixture of linseed oil and lard.

33. Water-proofing by painting with a mixture of linseed oil and grease.

34. Water-proofing by painting with a mixture of linseed oil and soap.

35. Water-proofing by painting with a mixture of linseed oil and detergent.

36. Water-proofing by painting with a mixture of linseed oil and cleanser.

37. Water-proofing by painting with a mixture of linseed oil and polish.

38. Water-proofing by painting with a mixture of linseed oil and wax.

39. Water-proofing by painting with a mixture of linseed oil and tallow.

40. Water-proofing by painting with a mixture of linseed oil and butter.

41. Water-proofing by painting with a mixture of linseed oil and lard.

42. Water-proofing by painting with a mixture of linseed oil and grease.

43. Water-proofing by painting with a mixture of linseed oil and soap.

44. Water-proofing by painting with a mixture of linseed oil and detergent.

45. Water-proofing by painting with a mixture of linseed oil and cleanser.

46. Water-proofing by painting with a mixture of linseed oil and polish.

47. Water-proofing by painting with a mixture of linseed oil and wax.

48. Water-proofing by painting with a mixture of linseed oil and tallow.

49. Water-proofing by painting with a mixture of linseed oil and butter.

50. Water-proofing by painting with a mixture of linseed oil and lard.

51. Water-proofing by painting with a mixture of linseed oil and grease.

52. Water-proofing by painting with a mixture of linseed oil and soap.

53. Water-proofing by painting with a mixture of linseed oil and detergent.

54. Water-proofing by painting with a mixture of linseed oil and cleanser.

55. Water-proofing by painting with a mixture of linseed oil and polish.

56. Water-proofing by painting with a mixture of linseed oil and wax.

57. Water-proofing by painting with a mixture of linseed oil and tallow.

58. Water-proofing by painting with a mixture of linseed oil and butter.

59. Water-proofing by painting with a mixture of linseed oil and lard.

60. Water-proofing by painting with a mixture of linseed oil and grease.

61. Water-proofing by painting with a mixture of linseed oil and soap.

62. Water-proofing by painting with a mixture of linseed oil and detergent.

63. Water-proofing by painting with a mixture of linseed oil and cleanser.

64. Water-proofing by painting with a mixture of linseed oil and polish.

65. Water-proofing by painting with a mixture of linseed oil and wax.

66. Water-proofing by painting with a mixture of linseed oil and tallow.

67. Water-proofing by painting with a mixture of linseed oil and butter.

68. Water-proofing by painting with a mixture of linseed oil and lard.

69. Water-proofing by painting with a mixture of linseed oil and grease.

70. Water-proofing by painting with a mixture of linseed oil and soap.

71. Water-proofing by painting with a mixture of linseed oil and detergent.

72. Water-proofing by painting with a mixture of linseed oil and cleanser.

73. Water-proofing by painting with a mixture of linseed oil and polish.

74. Water-proofing by painting with a mixture of linseed oil and wax.

75. Water-proofing by painting with a mixture of linseed oil and tallow.

76. Water-proofing by painting with a mixture of linseed oil and butter.

77. Water-proofing by painting with a mixture of linseed oil and lard.

78. Water-proofing by painting with a mixture of linseed oil and grease.

79. Water-proofing by painting with a mixture of linseed oil and soap.

80. Water-proofing by painting with a mixture of linseed oil and detergent.

81. Water-proofing by painting with a mixture of linseed oil and cleanser.

82. Water-proofing by painting with a mixture of linseed oil and polish.

83. Water-proofing by painting with a mixture of linseed oil and wax.

84. Water-proofing by painting with a mixture of linseed oil and tallow.

85. Water-proofing by painting with a mixture of linseed oil and butter.

86. Water-proofing by painting with a mixture of linseed oil and lard.

87. Water-proofing by painting with a mixture of linseed oil and grease.

88. Water-proofing by painting with a mixture of linseed oil and soap.

89. Water-proofing by painting with a mixture of linseed oil and detergent.

90. Water-proofing by painting with a mixture of linseed oil and cleanser.

91. Water-proofing by painting with a mixture of linseed oil and polish.

92. Water-proofing by painting with a mixture of linseed oil and wax.

93. Water-proofing by painting with a mixture of linseed oil and tallow.

94. Water-proofing by painting with a mixture of linseed oil and butter.

95. Water-proofing by painting with a mixture of linseed oil and lard.

96. Water-proofing by painting with a mixture of linseed oil and grease.

97. Water-proofing by painting with a mixture of linseed oil and soap.

98. Water-proofing by painting with a mixture of linseed oil and detergent.

99. Water-proofing by painting with a mixture of linseed oil and cleanser.

100. Water-proofing by painting with a mixture of linseed oil and polish.



UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

NOS. 83-5442, 83-5461, 83-5462

---

UNITED STATES OF AMERICA

v.

MACK BARNES Appellant in No. 83-5442  
HERBERT G. CASE, JR., Appellant in  
No. 83-5461  
LEIF R. SIGMOND, Appellant in No. 83-5462

---

On Appeal from the United States  
District Court for the District of  
New Jersey  
(Crim. Nos. 82-200-02, 01, & 03)  
(Honorable Dickinson R. Debevoise)

Argued April 10, 1984  
Before: ADAMS, BECKER and VAN DUSEN,  
Circuit Judges

---

JUDGMENT ORDER

---

After considering the contentions  
raised by appellants, namely, that (1) the  
suppressed state court materials used in  
the federal prosecution violated the  
Fourth Amendment; (2) the alleged criminal

conduct was not properly prosecuted under the mail fraud statute; (3) the court below erred in refusing to order the government to introduce chemical analysis of the materials alleged to have been illegally dumped; (4) the trial court erred in refusing discovery on point three; (5) they were prejudiced by the variance between the indictment and the proof introduced at trial; (6) the trial court's apparent reliance on race in the sentencing proceedings violated the equal protection clause; (7) it was error to admit a private diary into evidence; (8) the trial court erred in instructing the jury on a missing witness charge despite the lack of such a request for charge from the defendants; (9) the trial court erred in refusing to enforce all of the defendants' subpoenas; (10) the trial court erred in the supervision and instruction to the jury; and (11)

defendant Barnes was prejudiced by the inadvertent appending of material not in evidence to documentary evidence submitted by the prosecution and inspected by the jury, it is

ADJUDGED AND ORDERED that the judgment of the district Court be and is hereby affirmed.

BY THE COURT,

\_\_\_\_\_  
Circuit Judge

ATTEST:

\_\_\_\_\_  
Sally Mrvos, Clerk

DATED: April 16, 1984





## APPENDIX B



United States of  
American Vs.  
LEIF R. SIGMOND

United States District  
Court for the District  
of New Jersey  
Docket No. Criminal  
82-200

Filed:  
May 25, 1983  
at 11:00 a.m.  
Allyn Z. Lite

#### JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the  
government the defendant appeared in  
person on this date ---May 23, 1983

#### COUNSEL:

With Counsel - Dino Bliablias, Esq.

#### PLEA:

Not Guilty

#### FINDING & JUDGMENT:

There being a verdict of guilty.  
Defendant has been convicted as  
charged of the offense(s) of  
conspiracy (Count 1); use of mails in  
scheme to defraud (Counts 2, 3, 4, 7  
through 12, 15, 16 & 17).

#### SENTENCE OR PROBATION ORDER:

The court asked whether defendant had  
anything to say why judgment should  
not be pronounced. Because no  
sufficient cause to the contrary was  
shown, or appeared to the court, the  
court adjudged the defendant guilty as  
charged and convicted and ordered  
that: The defendant is hereby  
committed to the custody of the  
Attorney General or his authorized

representative for imprisonment for a period of two (2) years and six (6) months on Count 1 and the defendant to pay a fine of \$10,000.00; imposition of sentence suspended on each of counts 2, 3, 4, 7, 8, 9, 10, 11, 12, 15, 16 and 17 and the defendant placed on probation for a period of five (5) years on each count to run concurrently with each other, said probation to commence upon full and complete discharge from custodial sentence imposed on Count 1.

**SPECIAL CONDITIONS OF PROBATION:**

IT IS FURTHER ORDERED that execution of sentence be and is hereby stayed pending appeal.

**ADDITIONAL CONDITIONS OF PROBATION:**

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

**COMMITMENT RECOMMENDATION:**

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by U.S. District Judge

\_\_\_\_\_/LS  
DICKINSON R. DEBEVOISE

Dated: 5/25/83

United States of  
American Vs.  
HERBERT G. CASE,  
JR.

United States District  
Court for the District  
of New Jersey  
Docket No. Criminal  
82-200

Filed:  
May 25, 1983  
at 11:00 a.m.  
Allyn Z. Lite

#### JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date ---May 23, 1983

#### COUNSEL:

With Counsel - Justin Walder, Esq.

#### PLEA:

Not Guilty

#### FINDING & JUDGMENT:

There being a verdict of guilty. Defendant has been convicted as charged of the offense(s) of conspiracy (Count 1); use of mails in scheme to defraud (Counts 2, 3, 4, 7 through 12, 15, 16, 17, 19, 20 & 21).

#### SENTENCE OR PROBATION ORDER:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby



committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eighteen (18) months on Count 1 and that the defendant do pay a fine of \$2,000.00; imposition of sentence suspended on each of Counts 2,3,4,7,8,9,10,11,12,15,16,17,19,20 and 21 and defendant placed on probation on each count for a period of five (5) years to run concurrently with each other, said probation to commence upon full and complete discharge from custodial sentence imposed on Count 1.

#### **SPECIAL CONDITIONS OF PROBATION:**

IT IS FURTHER ORDERED that execution of sentence be and is hereby stayed pending appeal.

#### **ADDITIONAL CONDITIONS OF PROBATION:**

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, <sup>Any</sup> issue a warrant and revoke probation for a violation occurring during the probation period.

#### **COMMITMENT RECOMMENDATION:**

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by U.S. District Judge

DICKINSON R. DEBEVOISE /LS

Dated: 5/25/83

United States of  
American Vs.  
MACK BARNES

United States District  
Court for the District  
of New Jersey  
Docket No. Criminal  
82-200

Filed:  
May 25, 1983  
at 11:00 a.m.  
Allyn Z. Lite

### JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the  
government the defendant appeared in  
person on this date ---May 23, 1983

### COUNSEL:

With Counsel - Anthony Mautone, Esq.

### PLEA:

Not Guilty

### FINDING & JUDGMENT:

There being a verdict of guilty.  
Defendant has been convicted as  
charged of the offense(s) of  
conspiracy (Count 1); use of mails in  
scheme to defraud (Counts 2, 3, 4, 7  
through 12, 15, 16, 17, 20 & 21).

### SENTENCE OR PROBATION ORDER:

The court asked whether defendant had  
anything to say why judgment should  
not be pronounced. Because no  
sufficient cause to the contrary was  
shown, or appeared to the court, the  
court adjudged the defendant guilty as  
charged and convicted and ordered  
that: The defendant is hereby  
committed to the custody of the

Attorney General or his authorized representative for imprisonment for a period of six (6) months on Count 1 and that the defendant do pay a fine of \$500.00; imposition of sentence suspended on each of Counts 2,3,4,7,8,9,10,11,12,15,16,17,20 and 21 and the defendant placed on probation for a period of five (5) years on each count to run concurrently with each other, said probation to commence upon full and complete discharge from custodial sentence imposed on Count 1.

**SPECIAL CONDITIONS OF PROBATION:**

IT IS FURTHER ORDERED that execution of sentence be and is hereby stayed pending appeal.

**ADDITIONAL CONDITIONS OF PROBATION:**

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

**COMMITMENT RECOMMENDATION:**

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by U.S. District Judge

\_\_\_\_\_/LS  
DICKINSON R. DEBEVOISE

Dated: 5/25/83



## APPENDIX C





NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA :  
v. : Criminal  
: Action No.  
: 82-200.  
HERBERT G. CASE, JR., :  
MACK BARNES, LEIF R. :  
SIGMOND, and SCIENTI- : OPINION  
FIC CHEMICAL PROCESSING, :  
INC. :  
Defendants. :

DEBEVOISE, District Judge.

Appearances:

Charles S. Crandall, Esquire  
Assistant United States Attorney  
A. Patrick Nucciarone, Esquire  
Assistant United States Attorney  
Office of the United States Attorney  
Fraud and Public Protection Division  
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(Attorneys for the United States)

Justin P. Walder Esquire  
Walder, Steiner & Sondak, Esquires  
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Newark, New Jersey 07102  
(Attorneys for Defendant Case)

Anthony R. Mautone, Esquire  
Minichino & Mautone, Esquires  
2 Peach Tree Hill Road  
Box 475  
Livingston, New Jersey 07039

(Attorneys for Defendant Barnes)

Dino D. Bliablias, Esquire  
Stein, Bliablias & McGuire, Esquires  
11 Commerce Street  
Newark, New Jersey 07102  
(Attorneys for Defendant Sigmond)

At the conclusion of the November 1, 1982 hearing on defendants' various motions, I reserved two matters for subsequent disposition. First, defendants had moved to dismiss the indictment for the asserted reason that no proofs had been presented to the grand jury that there had been a use of the mails. I denied the motion but undertook to examine pertinent portions of the grand jury record and to reconsider my ruling if it appeared that the grand jury did not have evidence before it on the basis of which it could have concluded that there was probable cause to believe that the mails had been used in furtherance of the alleged fraudulent scheme. Second, I reserved decision on defendants' motions for a bill of particulars.

As to the evidence before the grand jury, I have examined it in sufficient detail to find that there was evidence to

enable the grand jury to conclude that there had been a requisite use of the mails in connection with the offense charged in each Count of the indictment. Thus, there is no reason to alter my earlier denial of defendants' motions to dismiss the indictment on this ground.

On October 15, 1982 defendants moved for a bill of particulars as to six matters. On October 19, 1982 defendant Case moved for particulars as to sixty-two (62) numbered matters, many of the numbered matters containing from seven to eighteen lettered sub-items.

The purpose of a bill of particulars is to enable a defendant to prepare his defense, to avoid surprise at the trial, and to protect a defendant against a second prosecution. United States v. Addonizio, 451 F.2d 49 (3d Cir. 1972), cert. denied, 405 U.S. 936 (1972). In

part to obtain the same ends, the Court in this District routinely enters a discovery order the Court at the time of arraignment. That was done in this case and as a result each defendant became entitled to copies of his statements within the possession of the Government, reports of physical or mental examinations and of scientific tests or experiments made in connection with the case in the Government's possession, the defendant's grand jury testimony, defendant's documents or other property in the Government's possession, defendant's prior criminal record and Brady material. In addition, the Government was required to pre-mark all exhibits it intends to introduce as part of its direct case and to permit defendants' attorneys to inspect and copy these exhibits thirty (30) days prior to trial. I am informed that the Government has complied with the requirements of the discovery order.

This case must, of necessity, depend in large measure upon documentary evidence showing shipments, billings, payments, reports to governmental agencies. These documents should show what hazardous wastes defendants claimed to have picked up and disposed of and the dates and places of asserted disposal. They came from Scientific Chemical Processing Company, Inc. ("SCP") and have been made available to defendants for examination and copying. Further, the Government has made available to defendants for inspection and copying the records of the chemical waste generators relevant to this case. These records disclose information about the wastes actually shipped. From these documents and from the Government's exhibits which have also been made available to defendants, much of the information they seek in their bill of particulars is available to them.

Turning to the motion for a bill of particulars filed on October 15, 1982, paragraphs 1 and 4 of Schedule A to that motion ask as to each incident of unlawful dumping referred to in paragraphs 15 and 17, respectively, of Count One of the indictment, for "the exact citation of each and every federal or state statute, regulation or other authority [by] [under] which the dumping was alleged to have been made unlawful". The Government asserts that through discovery it has already provided defendants with copies of the rules of the Passaic Valley Sewerage Commissioners ("Passaic Valley") which are alleged to have been violated. The Government does not claim to have furnished copies of statutes and regulations governing disposition of hazardous wastes other than through the facilities of Passaic Valley.

I think it is appropriate that the Government advise the defendants of the specific statutes and regulations which it claims were violated. This information need not be tied to particular paragraphs or Counts of the indictment, but the Government should list each such statute and regulation. An order will be entered requiring the Government to furnish particulars in this regard.

Paragraphs 2, 3, 5 and 6 of Schedule A of defendants' motion seek details as to the chemical composition of each substance alleged to have been dumped and the volume and chemical concentration of the substances which were dumped. This information need not be furnished by way of particulars. An examination of the records referred to above will provide defendants with all that they need to prepare their defense in this regard.



Defendant Case's motion for particulars filed October 19, 1982 constitutes a twenty-four page demand for everything that ingenious counsel could conjure up, without regard to whether the information sought has already been furnished, or whether it is the subject of the earlier discovery order, or whether it exists at all, or whether it is a proper subject for particulars.

I have examined with care each demand. Except to the extent that the information requested is the subject of the discovery order, the motion will be denied in its entirety for the following reasons:

1. The information sought is already the subject of a discovery order and, to the extent it exists, has been furnished to Case, e.g., Requests Nos. 1, 2, 3, 6, 7, 12 (to the extent the records were the property of SCP), 15.

2. The information sought is beyond that which is authorized by statute or by the Federal Rules of Criminal Procedure, e.g., Request Nos. 4, 5, 8, 9, 10, 11 (Rule 16(a)(1)(A)), 36 (Rule 16(a)(1)(B)).

3. The Government having informed defendants that no electronic surveillance or wiretaps were used in its investigation, and defendant Case having made no showing that his own rights were violated, the Government is not required to describe the method by which it obtained its evidence or conducted its investigation, Request Nos. 18, 38, 41, 42, 43, 49.

4. The Government is not required to specify in advance what evidence it intends to offer at trial or what witnesses it proposes to call, e.g., Requests Nos. 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 33, 37.

5. Defendant Case having made no showing of a compelling or particularized need, he is not entitled to information concerning grand jury proceedings which are normally protected by the rule of secrecy, e.g., Requests Nos. 44, 46, 48.

6. As in the case of most of the particulars sought in the October 15, 1982 motion, specification of minute details concerning illegal dumping and other acts charged in the indictment are not necessary for a proper defense of the case, as substantial information has been made available to defendants through the records to which they have access, and even were the records not available, the details sought are not normally discoverable through a demand for particulars, e.g., Requests Nos. 45, 50, 51, 54, 55, 56, 57, 58, 59, 60, 61, 62.

In summary, (i) there is no reason to modify my determination that defendants'

motion to dismiss the indictment should be denied; (ii) the Government will be required to specify each statute and regulation which it alleges defendants violated, and otherwise defendants' motion for a bill of particulars, filed October 15, 1982, will be denied; and (iii) defendant Case's motion for a bill of particulars, filed October 19, 1982, will be denied in its entirety, but such denial shall not affect the Government's continuing obligation to comply with the discovery order filed July 8, 1982.

The Government is requested to prepare a form of order implementing my November 1, 1982 rulings and the rulings set forth in this opinion.

Dated: November 16, 1982

Dickinson R. Debevois  
United States District  
Judge

## APPENDIX D



# **1. UNITED STATES CONSTITUTIONAL PROVISIONS**

## **Section 6, Clause 1. Compensation of members; privilege from arrest**

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech of Debate in either House, they shall not be questioned in any other Place.

## **AMENDMENT IV-SEARCHES AND SEIZURES**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

cause, supported by Oath or affirmation, and particular describing the place to be searched, and the persons or things to be seized.

**AMENDMENT V-CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



## 2. UNITED STATES STATUTES

### 18 U.S.C Section 317.

#### Conspiracy to commit offense or to defraud United States

If two or more prsons conspire either to commit any offense against the United States, or to defraud the United Staes, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

### 18 U.S.C. Section 1341.

#### Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to

defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or

thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both. June 25, 1984, c. 645, 62 Stat. 763; May 24, 1949, c. 139, Sect. 34, 63 Stat. 94.

### **3. FEDERAL RULES OF CRIMINAL PROCEDURE**

#### **Rule 7(f) Bill of Particulars.**

The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit.

A bill of particulars may be amended at any time subject to such conditions as justice requires. As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972.

#### **Rule 12. Pleadings and Motions before Trial; Defenses and Objections**

##### **(a) Pleadings and Motions.**

Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo

contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

- (1) Defenses and objections based on defects in the institution of the prosecution; or

- (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or

to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

(d) Notice by the Government of the Intention to Use Evidence.

(1) At the Discretion of the Government. At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use

specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

(2) At the Request of the Defendant. At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for

determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from waiver.

(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.



(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.

As amended Apr. 22, 1974, eff. Dec. 1 1975; July 31, 1975, Pub. L. 94-64 Sect. 3(11), (12), 89 Stat. 372.

(i) Production of Statements at Suppression Hearing. Except as herein provided, rule 26.2 shall apply at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer shall be deemed a witness called by the government, and upon



a claim of privilege the court shall excise the portions of the statement containing privileged matter.

### **Rule 35. Correction or Reduction of Sentence**

(a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in all illegal manner within the time provided herein for the reduction of sentence.

(b) Reduction of Sentence. The court may reduce a sentence within 120 days after the sentence imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation.

Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

(As amended Apr. 30, 1979, eff. Aug. 1 1979; Apr. 28, 1983, eff. Aug. 1, 1983).

#### **Rule 41. Search and Seizure**

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property or Persons Which May be Seized with a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally

possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuance and Contents.

(1) Warrant Upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exists or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or

place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not

to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) Warrant upon oral testimony--

(A) General Rule- If the circumstances make it reasonable to dispense with a written affidavit, a Federal Magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application - The person who is requesting the warrant shall prepare a document to be known as a

duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance. If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The

Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and certification of testimony. When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device

all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the court.

(E) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.



(F) Additional rule for execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to suppress precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken.

The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The Federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for

the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) Return of Papers to Clerk. The federal magistrate before whom the warrant is returned shall attach to the warrant a

copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(h) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any

category of officers authorized by the Attorney General to request the issuance of a search warrant.

(As amended Apr. 25, 1976, eff. Aug 1, 1976; July 30, 1977, Pub.L. 95-78, Sect. 2(d), 91 Stat. 320; Apr. 30, 1979; eff. Aug. 1, 1979).

#### **Rule 52. Harmless Error and Plain Error**

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

### **4. FEDERAL RULES OF EVIDENCE**

#### **Rule 606. Competency of Jurors as Witness**

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is

called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental process in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded

from testifying be received for these purposes.

(As amended Pub.L. 94-149, Sect 1(10), Dec.12, 1975, 89 State 805).

**Rule 803(1)**

**Hearsay Exceptions; Availability of Declarant Immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

THE UNIVERSITY OF CHICAGO  
DEPARTMENT OF THE HISTORY OF ARTS  
AND ARCHITECTURE  
AND THE MUSEUM OF ART AND ARCHITECTURE  
CHICAGO, ILLINOIS 60637  
U.S.A.  
TEL: (773) 936-3333  
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WWW: www.arthistory.uchicago.edu  
E-MAIL: art-history@uchicago.edu  
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## APPENDIX E



UNITED STATES  
DISTRICT COURT  
DISTRICT OF  
NEW JERSEY

V. : Criminal No.

ET AL.

: ORDER

E-1.

briefs and supporting documents and the argument of counsel as well as documents produced during oral argument, and for good cause;

IT IS on this 29th day of November 1982,

ORDERED that for the reasons stated from the bench on Monday, November 1, 1982 and set forth in the Court's opinion of November 16, 1982:

1. Defendants' joint motion for dismissal of the indictment be and hereby is denied;

2. Defendants' joint motion for the suppression of evidence be and hereby is denied;

3. Defendants' joint motion to dismiss Counts 4 through 7 and 9 through 14 be and hereby is denied;

4. Defendants' joint motion to force the government to elect among Counts 2 through 21 be and hereby is denied;

5. Defendants' joint motion to sever Counts 2 through 21 of the indictment be and hereby is denied;

6. Defendant Case's motion for a severance be and hereby is denied;

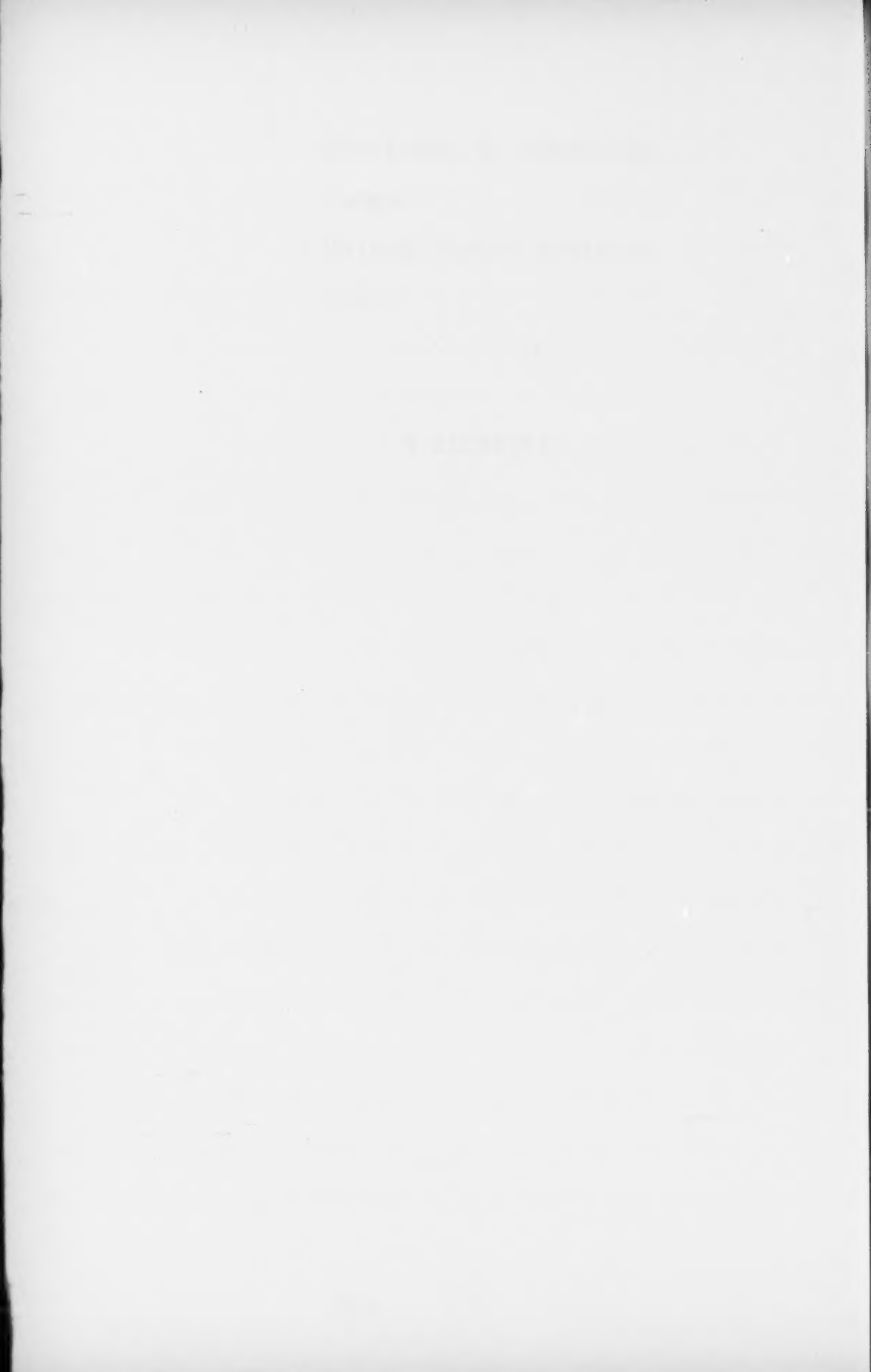
7. The United States delete the surplus language "the citizens of the State of New Jersey" from the indictment; and

8. Defendants' joint motion for an order requiring the government to furnish a bill of particulars be and hereby is denied except as to the following: The government shall furnish a bill of particulars which further defines the allegations of unlawful dumping in the indictment by specifying the statutes and regulations which it claims defendants violated.

9. Defendant Case's motion an order requiring the government to furnish a bill of particulars be and hereby is denied.

Dickinson R. Debevoise,  
Judge  
United States District  
Court

## APPENDIX F





IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

	Criminal No.82 200
UNITED STATES OF	:
AMERICA	: Transcript of
	: Proceedings
v.	:
	: SENTENCE
HERBERT G. CASE, JR.,	:
MACK BARNES, LEIF R.	: Newark, NJ
SIGMOND and SCIENTIFIC	: May 23, 1983
CHEMICAL PROCESSING	:
COMPANY, INC.,	:
	:
Defendants.	:

BEFORE:

HON. DICKINSON R. DEBEVOISE, U.S.D.J.

Appearances:

W. HUNT DUMONT, UNITED STATES ATTORNEY  
BY: A PATRICK NUCCiarONE, Assistant U.S.  
Attorney

CHARLES S. CRANDALL, Assistant U.S.  
Attorney

For the Government

JUSTIN P. WALDER, ESQ.  
For Defendant Case

ANTHONY R. MAUTONE, ESQ.  
For Defendant Barnes

DINO D. BLIABLIAS, ESQ.  
For Defendant Sigmond

\* \* \*

1 in this industry in this state that  
they are facing the  
2 possibility of incarceration, and the  
days when having to deal  
3 with the DEP or the EPA for not abiding  
by the regulations of  
4 those agencies were merely a cost of  
doing business are over  
5 and they are over for all times.

6 That's all I have to say.

7 THE COURT: Thank you, Mr.  
Nucciarone.

8 It now becomes necessary to impose  
sentence in  
9 this case. Before I turn to the  
individual defendants, I  
10 think it can be stated we are  
confronted with the tragic and  
11 unfortunate situation of having three  
individual defendants,

12 who in their personal lives, family  
lives, community lives,  
13 have led an exemplary existence, beyond  
criticism, and, in  
14 fact, much to be praised, much to merit  
emulation.

15 On the other hand, the jury has  
found that these  
16 three individuals and the corporation  
with which they were  
17 affiliated committed extremely serious  
offenses against the  
18 environment.

19 These are offenses which were  
perpetrated over a period,  
20 lengthy period of time. They are  
offenses which have  
21 unknown effects in the future, causing  
community harm which is  
22 beyond calculation.

23       The sentencing in this case,  
         therefore, involves  
24 weighing the undoubted virtues of the  
         defendants as  
25 individuals in other spheres of  
         activities and the necessity

1 that the kinds of conduct that led to  
this trial and to the  
2 necessity to engage in a sentencing  
hearing not be encouraged,  
3 and that the community have an  
unmistakable message that this  
4 kind of behavior will have serious  
consequences.

5 Reference has been made to others  
involved in  
6 this offense, namely, Mr. Perno, Mr.  
Borden, Mr. Heflich.  
7 These sentences really are not  
comparable. The sentences  
8 there, in the case of Mr. Perno and Mr.  
Borden, took into  
9 account the fact that they recognized  
the offenses and very  
10 early began to do what they could to  
undo it.

11 That has not been the case here.

We have gone

12 through trial, as the defendants had  
every right to do, but

13 nevertheless, I cannot weigh and  
balance the cooperation which

14 I could weigh in the case of the others  
who were mentioned.

15 That is an important consideration to  
me always. I can only

16 weigh here what the consequences will  
be with respect to the

17 community perception of these offenses  
and the consequences to

18 the individuals.

19 What I have done in each case --  
and I've

20 evaluated each separately -- is to give  
the minimum prison

21 sentence -- and there will be prison  
sentences in each case.--

22 to give the minimum prison sentence  
which I could give

23 consistent with the public notice and  
interpretation of the

24 sentences. To follow the course of  
alternative sentences,

25 cleaning up the premises or engaging in  
an environmental

1 project would not have effect.

2        Though I know these defendants need  
no

3 rehabilitation in the sense of  
impressing on them the

4 seriousness of the offense, the  
community does need to have

5 unmistakable message, and that it is  
what the sentences are

6 intended to do.

7        No defendant need stand up as I  
deal with him.

8 I'll just run through these one at a  
time.

9        I refer first to Mr. Leif R.

Sigmond. I received

10 numerous moving letters from his  
family, friends, business

11 associates, from teachers, others who  
have known him attesting



12 to his character, his qualities, his  
13 strong family ties, good  
14 friendship. However, in the case of  
15 Mr. Sigmond I must accept  
16 the fact that the evidence showed that  
17 he was the primary  
18 person in charge of running this  
19 corporation. It was his  
20 corporation. Though he may have been  
21 absent from the business  
22 from time to time, or even fairly  
extended periods of time, he  
nevertheless was totally in command and  
in control in the  
method in which it was conducted and in  
the activities which  
were the occasion for the indictment  
which led to the  
conviction here.

I should add with respect to the  
jury verdict, it

23 was the verdict. I have found on  
previous occasions

24 there was ample evidence to support  
that verdict.

25 Taking into account the various  
factors, the

1 sentence in the case of Mr. Sigmond to  
be: It is adjudged the  
2 defendant is hereby committed to the  
custody of the Attorney  
3 General, or his authorized  
representative for imprisonment for  
4 a term of two years and six months and  
fined the sum of  
5 \$10,000 on Count 1 of the indictment.  
Imposition of sentence  
6 on Counts 2 through 4, 7 through 12, 15  
through 17 of the  
7 indictment is hereby suspended and the  
defendant is placed on  
8 probation for a period of five years to  
commence upon the full  
9 and complete discharge of the custody  
sentence imposed on  
10 Count 1.  
11 Turning to Mr. Case, again, I have  
this letter.

12 It is a very thoughtful, extended  
presentation of his  
13 position, his views, his background. I  
have had numerous  
14 letters, eloquent letters from members  
of his family, letters  
15 from friends, other associates and  
teachers and I took these  
16 letters, as I did all the letters, very  
much into account.

17 I hope in all cases, Mr. Case and  
the others,  
18 that after the term of incarceration  
they will be able to  
19 return and pick up these very positive  
areas of their lives  
20 with this behind them.

21 These letters attest to the fine  
character and  
22 qualities, strong family persons,  
traditions of community

23 service, again, which I have to weigh  
against the terrible  
24 effects of what was done in this case.

25 In the case of Mr. Case, I find  
that he was not

1 as responsible in the corporate actions  
as Mr. Sigmond. he  
2 had a lesser role, albeit the major  
role, and one which had  
3 considerable elements of  
responsibility, even though he was  
4 more involved with sales than in the  
day-to-day operation of  
5 disposing of the materials which were  
brought to the company's  
6 two premises. He certainly knew what  
was happening and was  
7 operating with that knowledge.

8 Therefore, the sentence will be,  
with respect to  
9 Mr. Case: It is adjudged the defendant  
is hereby committed to  
10 the custody of the Attorney General or  
his authorized  
11 representative for imprisonment for a  
term of 18 months, and

12 fined the sum of \$2,000 on Count 1 of  
the indictment.

13 Imposition of sentence on Counts 2  
through 4, 7  
14 through 12, 15 through 17, 20 and 21 of  
the indictment is  
15 hereby suspended and the defendant is  
placed on probation for  
16 a period of five years, to commence on  
the full and complete  
17 discharge from the custody sentence  
imposed on Count 1.

18 Turning to Mr. Mack Barnes. Mr.  
Barnes I find is  
19 in a somewhat different position than  
the other defendants,  
20 both as to background and as to role in  
the company here.  
21 He is a black man born in the south  
before the

22 time when civil rights activities had  
changed the face of the  
23 south. He was educated. He had  
honorable service in the  
24 United States Army. Like the other  
defendants, he is  
25 honorably supporting a family.



1 I've had letters with respect to  
him, not as  
2 many, but I think sometimes the quality  
of a letter and not  
3 the number is significant, and he, like  
the others, is capable  
4 of and has engaged in productive work  
other than the work  
5 involved in this particular case.

6 I don't find that Mr. Barnes' role  
in the company  
7 was as controlling as that of Mr. Case  
and Mr. Sigmond. He  
8 was perfectly aware of what was going  
on, and, in fact, was  
9 instrumental in conducting it, but  
nevertheless it was of a  
10 much lower level responsibility. His  
attorney characterized  
11 him as simply a paid worker. I think  
he was more than that.

12 He was running the trucking operation  
to a very major extent,

13 but nevertheless he was not at the  
executive level of the

14 others and I think this must be taken  
into account.

15 He had fewer of the advantages in  
life than the

16 other two defendants. I think this  
must be taken into account

17 in the sentencing process.

18 The sentence in the case of Mr.  
Barnes will be:

19 It is adjudged the defendant is hereby  
committed to the

20 custody of the Attorney General or his  
authorized

21 representative for imprisonment for a  
term of six months, and

22 fined the sum of \$500 on Count 1 of the  
indictment.

23 Imposition of sentence on Counts 2  
through 4, 8  
24 through 12, 15 through 17, 20 and 21 of  
the indictment is  
25 hereby suspended. The defendant is  
placed on probation for a

1 period of five years, to commence upon  
full and complete  
2 discharge from the custody sentence  
imposed on Count 1.

3 As to the corporation, I think  
there is no need  
4 for any discussion. The corporation  
has not appeared at any  
5 time during these proceedings. It can  
only be sentenced on a  
6 monetary basis which may be somewhat  
illusory, since its  
7 existence is in doubt. But its  
sentence will be: It is  
8 adjudged that the defendant corporation  
pay a fine to the  
9 United States in the sum or \$10,000 on  
Count 1 of the  
10 indictment. The defendant corporation  
pay a fine to the

11 United States in the sum of \$500 on  
each of Counts 2, 3, 4, 7,  
12 8, 9, 10, 11 and 12, and that the  
defendant corporation pay a  
13 fine to the United States in the sum of  
\$500 on each of Counts  
14 15, 16, 17, 19, 20 and 21. Therefore,  
it is the intent of the  
15 Court that the sentence be a total fine  
in the amount of  
16 \$17,500.

17 I would advise each of the  
individual defendants  
18 that he has a right to appeal. The  
appeal must be filed  
19 within ten days of the entry of this  
judgment. If any  
20 defendant at this point is unable to  
afford the services of an  
21 attorney, an attorney will be appointed  
for him in the Court

22 of Appeals, and the Clerk of Court  
will, upon request, file a  
23 notice of appeal on behalf of that  
defendant.

24 In conclusion. I would simply  
state that I hope  
25 that both aspects of these sentence  
will be realized, that

1 the community will recognize the  
2 seriousness of this kind of  
3 activity, and ultimately, that these  
4 defendants will be able  
5 to undergo punishment which has been  
6 meted out without  
7 destroying themselves, their  
8 families. They are strong  
9 individuals, all three of them. Their  
10 families are strong  
11 families. I think more than is the  
case in most sentences  
which I've had to impose, I think the  
personal strengths and  
the family strength and the friendship  
strength is there to  
accept this and move on to a life with  
this behind them and a  
new and constructive era for each.

11 MR. WALDER: Judge, I think  
inadvertently your

12 imposition of Mr. Case's sentence, you  
skipped Count 19, which

13 I would assume you were going to  
suspend as you did the

14 predecessor counts other than Count 1.

15 THE COURT: Yes, 19 should have  
been mention.

16 That is included. Did I miss any  
others?

17 MR. WALDER: That's the only one  
that I notice.

18 THE COURT: Any other applciations?

19 MR. BLIABLIAS: Yes, your Honor. I  
would like to

20 make application for bail pending  
appeal.

21 My understanding that there is  
presently bail in

22 the form of a personal recognizance  
which can be, I'm advised,



23 continued for purposes of appeal.

Therefore, I would like to

24 apply to have present bail on behalf of

Mr. Sigmond be

25 continued pending his opportunity to

perfect his appeal.

1 MR. WALDER: I would like to make  
the same  
2 application for Mr. Case.

3 MR. MAUTONE: I would join in that  
application.

4 I understand that you have ten days  
under the federal system  
5 to file the notice of appeal.

6 THE COURT: Yes. Any objection?

7 MR. NUCCIARONE: There is no  
objection, your

8 Honor.

9 THE COURT: Bail will be continued  
pending

10 appeal. I have not made any  
arrangements for personal

11 surrender at this time. If an appeal  
is not taken, let me

12 know and arrangements will be made.

Thank you very much.

13 MR. NUCCIARONE: Your Honor, just  
for  
14 clarification, with respect to each of  
the substantive counts  
15 the five-year probationary term was  
imposed as to each and  
16 every one, but concurrent with each and  
every other one?

17 THE COURT: Yes, one five-year  
probation term.

18 MR. NUCCIARONE: Thank you.

19 THE COURT: Yes, all right. Thank  
you.

20

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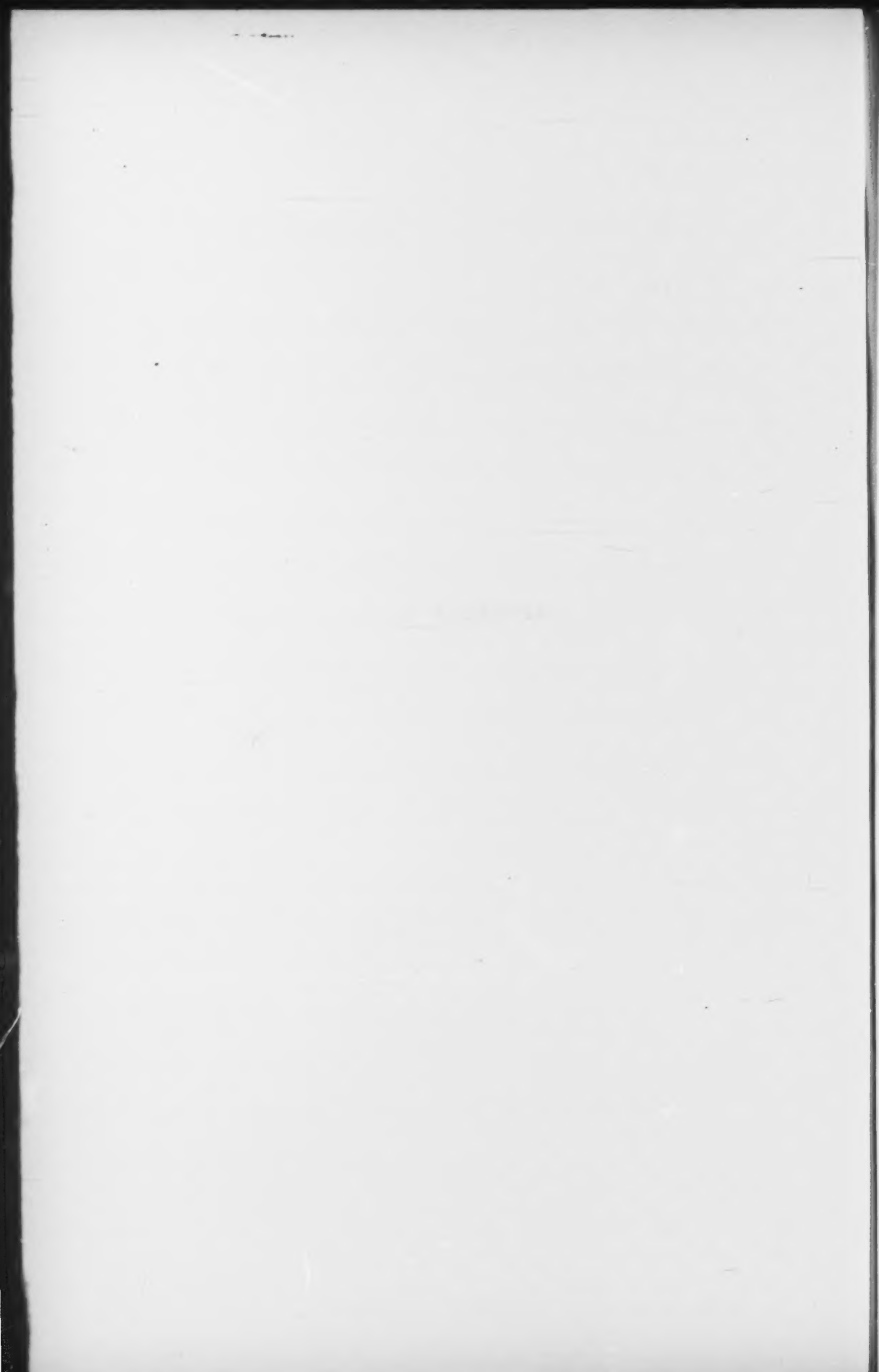
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## APPENDIX G



JAMES ZAZZALI  
Attorney General of New Jersey

By: John S. Furlong  
Deputy Attorney General  
Division of Criminal Justice  
13 Roszel Road  
Princeton, New Jersey 08540  
(609) 452-9500, Extension 322

SUPERIOR COURT  
OF NEW JERSEY  
COUNTY OF ESSEX  
LAW DIVISION -  
CRIMINAL  
INDICTMENT NO.  
SGJ 51-78-2

STATE OF NEW JERSEY, )

Plaintiff, )

v. ) ORDER

SCIENTIFIC CHEMICAL )

PROCLSSING, INC., )

Defendant. )

This matter having been opened to the  
court on May 2, 1980, Ralph DeRose, Esq.  
and Donald Rinaldi, Esq. appearing on  
behalf of Defendant Scientific Chemical  
Processing, Inc., Steven Greenstein, Esq.,  
appearing on behalf of Defendant Case,  
Dino Bliablias, Esq., appearing on behalf  
of Defendant Sigmond, Michael Pedicini,

Esq., appearing on behalf of Defendant Barnes, Michael Rodburg, Esq. of counsel to defendants, and Deputy Attorneys General Gregory Sakowicz, Charles Buckley, and James O'Halloran appearing on behalf of the State of New Jersey, the Court having heard the arguments of counsel and having previously denied this motion to suppress evidence on May 2, 1980, and the Court now acting sua sponte, having reconsidered the arguments of counsel;

It Is ORDERED on this 3rd day of April, 1981, that the order of the Court entered May 2, 1980 be and hereby is vacated, and that the motion to suppress evidence be and hereby is granted.

---

WILLIAM H. WALLS, J.S.C.



## APPENDIX H

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

v.

No. 82-200

Herbert G. Case, et al

To Chief Counsel/Staff Director,  
Custodian of Records or any other  
person authorized to identify  
documents to be produced.  
United States House of  
Representatives, 2125 Rayburn, House  
Office Building, Washington, D.C.  
20215

You are hereby commanded to appear in the  
United States District Court for the  
District of New Jersey at the U.S.  
Courthouse & Post Office Building in the  
city of Newark, NJ on the 17th day of  
January, 1983 at 10:00 o'clock a.m. and  
bring with you (See attached)

This subpoena is issued upon application  
of the defendant Herbert G. Case.

Jan. 11, 1983

By: \_\_\_\_\_ 1/s

Deputy Clerk

\_\_\_\_\_  
1/s

Barry A. Kozyra  
Attorney for Defendant  
17 Academy Street  
Newark, NJ

RETURN

Received this subpoena at 1300, 19th St.  
N.W. on Jan. 17, 1983 and on Jan. 17, 1983  
at 3:48 p.m. served it on the within named  
Sharon E. Davis by delivering a copy to  
her and tendering to her the fee for one  
day's attendance and the mileage allowed

## APPENDIX I



HAZARDOUS WASTE MATTERS:  
A CASE STUDY OF  
LANDFILL SITES

HEARING  
BEFORE THE  
SUBCOMMITTEE ON  
OVERSIGHT AND INVESTIGATIONS  
OF THE  
COMMITTEE ON ENERGY AND COMMERCE  
HOUSE OF REPRESENTATIVES  
NINETY-SEVENTH CONGRESS  
FIRST SESSION  
JUNE 9, 1981  
SERIAL NO. 97-43  
PRINTED FOR THE USE OF THE  
COMMITTEE ON ENERGY AND COMMERCE

TESTIMONY OF GREGORY SAKOWICZ

MR. SAKOWICZ. I have been asked to appear today to testify before this subcommittee regarding the regulatory enforcement role of the Division of Criminal Justice with respect to the Lone Pine landfill in New Jersey. In that regard, I wish to advise that the Division of Criminal Justice does not have any regulatory function in respect to the Lone Pine landfill, or any other landfill. However, I am prepared to discuss the Division of Criminal Justice's enforcement role with respect to the Lone Pine landfill.

On July 13, 1978, following a covert investigation into the the disposal practices of a Scientific Chemical Processing, Inc., a waste treatment facility, criminal search warrants were executed upon the premises.



During the course of the investigation of this waste treatment facility, representatives from the Division of Criminal Justice learned that a certain individual had removed approximately 50,000 drums from the SCP site at the rate of \$5 per drum.

The individual who made this allegation did not know the location to which the drums of chemical waste had been taken. It was his opinion that the drums were being taken to a landfill in the southern part of New Jersey and that the drums were in fact being buried. It was also revealed at this time that the driver of a trucking company would, on occasion, place a telephone call from the waste treatment facility to the landfill which was to accept this material. It was further revealed that the telephone calls would be made for the purpose of either (1) determining whether or not any

inspectors were at the landfill at that time and/or (2) requesting that the landfill stay open until the truckload of drums would arrive.

With this information now available, subpoenas were issued for the telephone toll records of the subject company. Under receipt of these records, it was learned that several calls had been placed to the Lone Pine Landfill in Freehold, N.J. Following this, state investigators from the division of criminal justice conducted a reconnaissance of the Lone Pine Landfill, on November 3, 1978.

Additionally, another State investigator conducted an aerial reconnaissance on November 8, 1978. These reconnaissances were made for the purpose of establishing ground level surveillance points. Both the observations of the land based investigators and that investigator conducting the aerial surveillance

indicated that a potential existed that the Lone Pine Landfill had been, or was being used for the disposal of some type of liquid material.

Following several days of ground level surveillance at the site, it was determined that a specific carter had been observed transporting tankers to the Lone Pine Landfill. Mobile surveillances of these vehicles established that the material being transported originated from two locations. A manufacturing plant in the local area of the landfill and from a municipal sewage treatment plant in New Jersey.

With this information now available, I contacted the New Jersey Department of Environmental Protection in order that more specific information could be secured concerning the Lone Pine Landfill. On November 21, 1978, I was advised that the Lone Pine Landfill had been the site of a

fire during May or June 1978 and that the fire did include, in part, materials of a chemical nature and that the department of environmental protection had imposed a fine with regard to this fire.

Following this telephone conversation, representatives from the division of criminal justice spoke to the department of environmental protection to determine what materials could legally be accepted by the Lone Pine Landfill and to determine what materials were being transported from the two aforementioned generators: the sewage treatment facility and the local manufacturing plant. We were told that the Lone Pine Landfill could legally accept these materials.

On November 29, 1978, I submitted a memorandum to my supervisors requesting that some arrangements be made for the review of the department of environmental protection files concerning the Lone Pine

Landfill. On December 19, 1978, I contacted Director Tylutki of the New Jersey Department of environmental protection's Solid Waste Administration regarding arrangements to review the department of environmental protection files on Lone Pine.

Director Tylutki told me that the landfill experienced a "significant chemical fire" in June and that, at that time, the landfill was illegally accepting chemical waste. According to Director Tylutki, the owner of the landfill placed all the blame and responsibility on the landfill's manager who allegedly fled to Florida. I was told by Director Tylutki that there are pending administrative orders against Lone Pine for purposes of cleaning up its area and that the solid waste administration was considering the closure of this landfill.

Later that date, a state investigator met with the department of environmental protection representatives and was allowed access to the department of environmental protection file and received photocopies of pertinent materials.

On January 8, 1979, after a review of the pertinent materials by the investigator, I discussed these materials with him in order to plan a course of action. Upon review and discussion it was determined that in addition to establishing the fact that a fire had occurred on the landfill on June 23, 1978, there was information in the file providing a summary of what had transpired at that landfill from June 21, 1978 until November 2, 1978. The files contained a handwritten memo from a department of environmental protection inspector, dated June 23, 1978. This handwritten report indicated that approximately 47 drums of

material had been located, that the vegetation in certain areas was dead and that observations were made concerning a "recently covered chemical pool".

On June 23, 1978, the Federal Environmental Protection Agency responded to the site of the fire and took water samples for analysis. On June 25, a department of environmental protection inspector responded to the Lone Pine landfill and had a conversation with a bulldozer operator who claimed to have knowledge concerning drums being brought into the Lone Pine landfill. This environmental protection inspector's memorandum indicates that the bulldozer operator identified the first name of an individual and a specific geographical area from which this person came and named two other carters as being involved in the transporting of chemicals to Lone Pine.

The documentation also indicated that the department of environmental protection inspection personnel conducted nocturnal surveillances at the Lone Pine site on June 27 and 28, 1978, and July 1, 1978. These surveillances did not reveal any additional evidence of illegal dumping activities.

After a review of the department of environmental protection files, representatives of the division of criminal justice met with inspectors from the department of environmental protection solid waste administration to discuss the information contained in those reports. It was of particular interest to all concerned to identify the carters who were mentioned by the bulldozer operator.

Based upon these discussion with the department of environmental protection, a suspect individual was identified. Additionally, it was believed that two of



the three carters were identified. Following this, state investigators established surveillances of two entities at two separate locations. It was determined that surveillances would be established because even though chemical waste was no longer going to Lone Pine landfill, it was possible that these entities might be transporting chemical waste to other locations which, if they were taking this chemical waste knowingly and illegally, would become targets of an investigation. It was also thought that if we were able to apprehend these carters actually dumping chemical waste at another location, then it would be possible to exert pressure in order to determine what had actually occurred with these carters at the Lone Pine Landfill.

It should be noted that a review of the records of the waste treatment facility mentioned at the outset of my

statement indicated that one of the suspect carters had transported chemical waste from the waste treatment facility only until May 1, 1978 which was the date that New Jersey instituted its special waste manifest system.

Surveillances were established on the two carters which had been identified. These surveillances occurred over the course of several days. However, little information of evidential value was learned.

With regard to the efforts expended to locate the aforementioned bulldozer operator employed during June 1978 at Lone Pine landfill, it is my recollection the inspector from the department of environmental protection, who had the initial conversation with the operator in June 1978 did have followup conversations with the operator in June 1978. At a date uncertain during the course of the

investigation, the inspector advised me that he had in fact spoken to and identified the bulldozer operator. It was represented to me by this inspector that the bulldozer operator did not have specific information regarding chemicals being brought to Lone Pine.

Because there was no indication in early 1979 that the landfill was currently accepting chemical waste, efforts of the investigators assigned to toxic waste matters were directed to other investigations. However, the Lone Pine file was kept open for further development as time allowed.

Specifically efforts were directed toward surveillances of the Iron Oxide Corp. in Elizabeth, N.J. Following 4 weeks of intensive surveillance activities, criminal search warrants were executed at Iron Oxide on April 10, 1979. Additionally, arrests by

investigators of the toxic waste unit were made at Price's landfill in Atlantic County, N.J., when employees on the Lightman Drum Co. illegally offloaded drums of chemical waste on November 15, 1978. I should add it was also into a landfill which is experiencing pollution problems. These investigations resulted in criminal indictments against 4 corporations and 10 individuals. The corporations were Chemline, Iron Oxide Corp., Perk Chemical and Lightman Drum Co., Inc. It should be noted that until July 1, 1979, the total complement of the toxic waste investigation unit of the division of criminal justice was comprised of one attorney, one auditor and two field investigators.

On August 14, 1979, Lester Jargowski, Monmouth County health officer, contacted the division of criminal justice to apprise it of the fact that the

unidentified entity had disposed chemical waste on State property in the Turkey Swamp game preserve near Freehold, N.J. Turkey Swamp is located immediately across the road from the Lone Pine landfill. The access roads to both Turkey Swamp and Lone Pine landfill are identical. Based upon this new allegation of dumping at both Lone Pine and Turkey Swamp, nocturnal surveillances were established at Turkey Swamp during the month of August 1979.

After several surveillances, Mr. Jargowski advised us that the possible illegal chemical disposal had drawn quite a bit of attention in the local areas in terms of both media and governmental agencies. It is possible that due to this notoriety, our surveillance was not productive. The criminal investigative file of Turkey Swamp was closed by the division of criminal justice. It was reopened when Lester Jargowski advised us

that it was possible to install remote sensing devices at the Turkey Swamp area.

MR. GEORGE: Mr. Sakowicz, if you would hold up for a few minutes, we are going to have to adjourn for a vote on the floor. It won't take more than 10 minutes, and we will reconvene at that time.

(Brief recess).

MR. GEORGE: The subcommittee will come to order.

I would like to invite you to proceed, Mr. Sakowicz.

MR. SAKOWICZ: Immediately prior to the break I had just mentioned that after conducting several days of nocturnal surveillance at Turkey Swamp, we closed our investigation. I should add that the information provided by Mr. Jargowski was that this site was being used on a sporadic basis by dumpers. This was not a case where if you waited every night you would see someone come in.

The remote sensing equipment was set up in Turkey Swamp during April 1980. The investigative unit within the New York Inter-Agency Hazardous Waste Task Force coordinated with Mr. Jargowski with regard to this sensing equipment. It should be noted that investigative personnel did respond to this site when the monitoring equipment was activated. Both representatives from the inter-agency task force and Mr. Jargowski responded to the Turkey Swamp on May 10, 1980.

Two days after this incident on May 12, 1980, Mr. Jargowski contacted the division of criminal justice to advise us that he had subsequently learned the address of this ex-bulldozer operator and had in fact spoken to him. Mr. Jargowski advised this State investigator that the individual did not have any knowledge of drums being buried within the parimeters of the Lone Pine landfill. This



individual was employed to bring clean fill into the active areas of the Lone Pine landfill so that it could be used as ground cover.

Allegedly, while scraping the clean fill from land contiguous to the landfill, this individual uncovered some drums. At that time, the State investigator discussed with Mr. Jargowski the possibility of this bulldizer operator being the same person who had been on the site the day of the fire. Mr. Jarkowski advised him that these were in fact two distinct individuals.

When Mr. Jarkowski provided the investigator with the address of this individual, the investigator responded to that location that date. In total, the investigator made three attempts to speak with this individual. Additionally, this State investigator spoke with neighbors in the area who professed to have no



knowledge of the individual. Based upon the fact that Mr. Jargowski had spoken with this individual and that he apparently had no relevant information, no further efforts were made to locate this person.

Returning now to the Turkey Swamp matter, contact was maintained with Mr. Jargowski until July 17, 1980, when it was reported to the New Jersey Inter-Agency Task Force by Mr. Jargowski that he had inspected a Turkey Swamp area. Since these inspections did not reveal any evidence of chemical waste dumping into or about the pond area, nor waste tanker track impressions, the investigation into Turkey Swamp was ceased and the sensing devices were in fact removed.

For purposes of setting forth the workload of those few investigators assigned to toxic waste matters, I would like to set forth some of the actions and

investigations undertaken by those investigators for the time period involved.

Criminal search warrants were executed at the SCP, Inc. facility in Newark, NJ on July 13, July 27, and September 11, 1978.

Arrests made and search executed at Price's landfill on November 15, 1978. Return of indictment against Scientific Chemical Processing on February 13, 1979.

Execution of criminal search warrants at Iron Oxide Corp. in Elizabeth on April 10, 1979.

The New Jersey Inter-Agency Strike Force officially began operations on July 1, 1979. It wasn't until July 1980, however, until all personnel were hired for that activity.

MR. GORE: Search warrants executed on vehicle containing drums of chemical waste on July 23, 1979. Excuse me. You

said it wasn't until July 1980. Your text reads January.

MR. SAKOWICZ. We started hiring investigators and personnel in July 1979. The actual date the task force took effect was July 1, 1979.

MR. GORE: But the next sentence says "It wasn't until January 1980 that all personnel were hired."

MR. SAKOWICZ: All personnel.

MR. GORE. All right.

MR. SAKOWICZ. We did not hire all of the investigators and support personnel until January 1980.

MR. GORE: Go ahead.

MR. SAKOWICZ. That was the official date when the State police detectives were assigned to the task force.

Search warrants were executed at Duane Marine Corp. on August 9, 1979.

Search warrants executed at Sepan Chemical Co., Municipal Sanitary Landfill

Authority, and Modern Industrial Waste Corporation on September 12, 1979.

Assistance provided to Pennsylvania Attorney General's Office with regard to their execution of search warrants at Hudson Oil on September 14, 1979.

Search warrants executed on a Jersey Sanitation roll-off in East Brunswick on October 19, 1979.

Search warrants executed at Jersey Sanitation and Samsom Tank Cleaning on October 11, 1979.

The foregoing is a summary of some major activities undertaken by the investigative personnel assigned to hazardous waste investigations. It should be noted that during this time, a multitude of other matters required the time and energy of investigative personnel assigned to toxic waste unit.

The investigative file concerning Lone Pine landfill was officially closed

within the Division of Criminal Justice on March 6, 1980. This decision to officially close the Lone Pine file was made based upon existing priorities and the likelihood, or lack thereof, of retroactively building a criminal case against the Lone Pine landfill.

Additionally, the Lone Pine landfill was the subject of civil litigation at this time. Therefore, if additional facts came to light during the discovery phase of this litigation, it could then be transmitted back to the task force for its consideration.

The primary decision to close the criminal file on this matter was based upon available manpower resources. During the 2 months immediately proceeding this closure, the investigative personnel assigned to this unit were involved in the following action: indictment against Joseph Attanasi for attempted bribery of a

police officer; indictment returned against Jerome Lightman Attanasi Drum and William Holbrook; emergency response to discharge a tanker in North Jersey; execution of search warrants at Madison Industry on February 6, 1980; indictment of Iron Oxide Corp., Chemline and Perk Chemical Co. on February 19, 1980.

During the period of closeout, evidence was being presented with regard to the activities of Samsom Tank Cleaning, Jersey Sanitation and Chelsea Terminals. This indictment was returned on April 20, 1980. As the committee can plainly see, the investigative unit of the New Jersey Inter-Agency Task Force is involved in a myraid of investigation which often requires that actions be taken during the same period of time. Consequently reasoned decisions must be made so that the limited resources of the investigative unit could be directed to those

investigations which in the opinion of the task force members are deemed to be most appropriate.

On April 19, 1981, the Action Committee of the New Jersey Inter-Agency Task Force convened its scheduled meeting. At that time, it was resolved that for purposes of any continued criminal investigation of the Lone Pine landfill, the office of the U.S. Attorney would assign an Assistant U.S. Attorney to coordinate the investigation and that the Division of Criminal Justice would assign a toxic investigator to work with the Office of the U.S. Attorney to develop a case. It was also resolved at that time that the appropriate action would be taken by either a Federal grand jury and the State grand jury if the information developed and warranted such action.

I am aware, of course, being sent by this committee through the U.S. Attorney's

Office requesting an investigation into this matter. We have acted upon that.

This completes my statement on the role of the Division of Criminal Justice with respect to Lone Pine and with respect to the investigative unit of the New Jersey Task Force for the appropriate period of time.

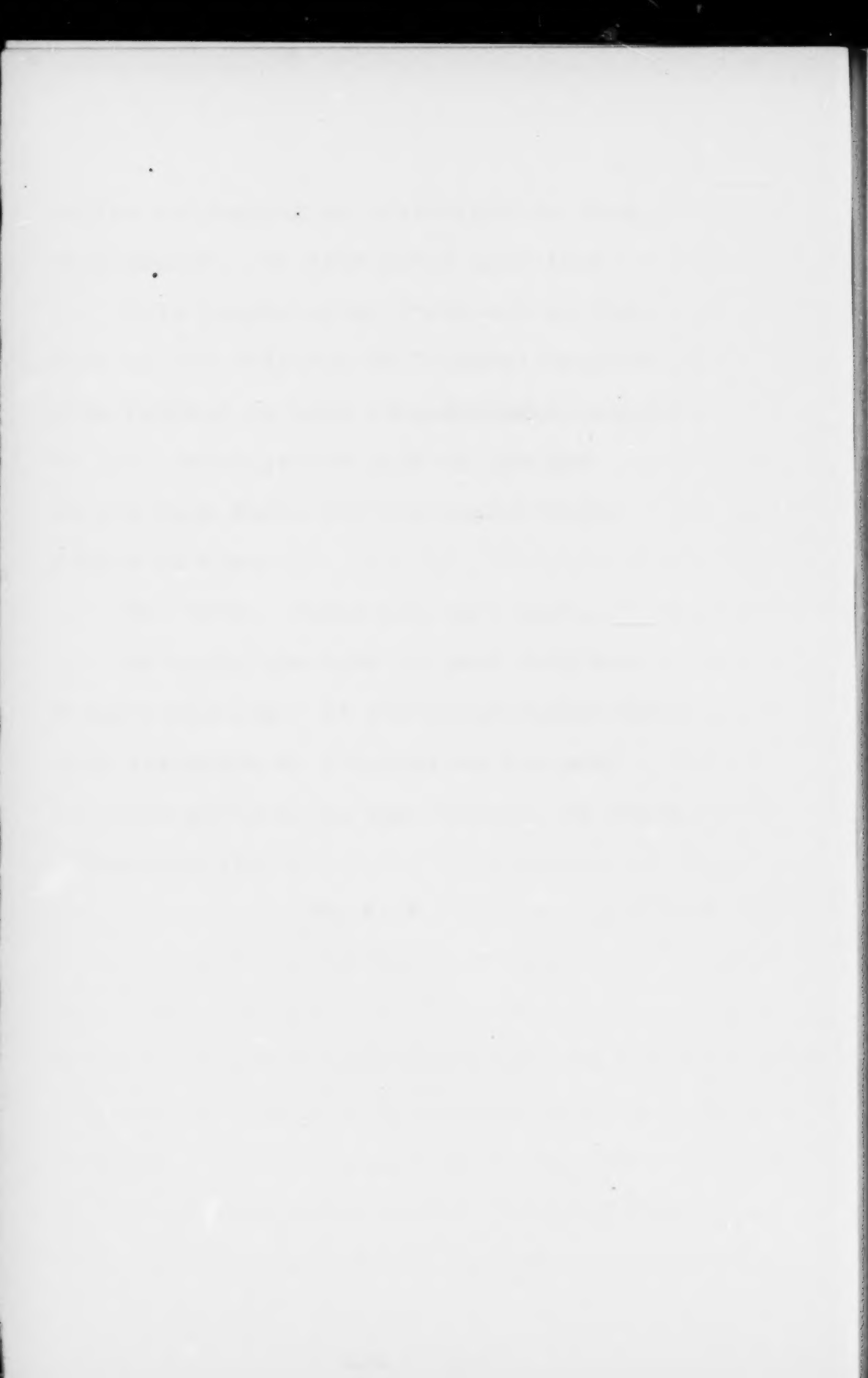
MR. GORE. Thank you very much.

We would now like to hear from Mr. Richard Dewling. If you could summarize your statement by focusing on the most relevant portions to the inquiry, we would appreciate it.

\* \* \*



## Appendix J



UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : CR.82-200  
v. : ORAL OPINION  
HERBERT G. CASE, JR., :  
et al., :  
Defendant. :

November 1, 1982  
Trenton, New Jersey

BEFORE:

The Honorable DICKINSON R. DEBEVOISE,  
U.S.D.J.

APPEARANCES:

W. HUNT DUMONT, ESQ.,  
United States Attorney  
For the Government  
By: CHARLES S. CRANDALL, ESQ., AUSA  
-and-  
A. PATRICK NUCCIARONE, ESQ., AUSA

JUSTIN WALDER, ESQ.  
-and-  
BARRY KOZYRA, ESQ.,  
For Defendant Case

ANTHONY R. MAUTONE, ESQ.,  
For Defendant Barnes

DINO D. BLIABLIAS, ESQ.,  
For Defendant Sigmond

\* \* \*

THE COURT: Defendants Herbert G. Case, Jr., Mack Barnes, Leif R. Sigmond, and Scientific Chemical Processing Company, Inc., which I shall refer to as SCP, have been indicted for conspiracy to commit mail fraud (Count 1) and for 20 substantive violations of the Federal mail fraud statutes (Counts 2 through 21).

SCP was in the business of transporting, treating, recovering and disposing of industrial wastes. During the period between June 1977 and October 1978, the period covered by the indictment, SCP maintain facilities at 411

12 Wilson Avenue in Newark and at 216  
Paterson Plank Road in  
13 Carlstadt, New Jersey. The Government  
alleges that beginning  
14 on May 1, 1978 both SCP facilities  
received temporary operat-  
15 ing authorization from the New Jersey  
Department of Environ-  
16 mental Protection, which I shall refer  
to as the DEP. The  
17 Government further alleges that SCP's  
Newark facility, which  
18 was located within the Passaic Valley  
Sewerage Commission  
19 district, was authorized only to  
dispose of certain wastes  
20 into the sewer system and was not  
authorized to dump un-  
21 treated waste into that system.  
22 The indictment charges that  
defendants engaged in a

- 23 conspiracy which involved a continuing  
course of fraudulent  
24 conduct on their part, including: (1)  
false representations  
25 to generators of hazardous industrial  
chemical wastes that

1 these wastes would be lawfully  
disposed of; (2) contracts  
2 and agreements designed to induce  
generators to do business  
3 with defendants; (3) false statements  
to Passaic Valley and  
4 DEP designed to conceal defendants'  
actual conduct; (4) the  
5 payment of bribes to effect part of  
the scheme, and (5) il-  
6 legal dispositions of industrial  
chemical wastes.

7 Defendants have filed a number of  
motions. This opin-  
8 ion will deal with all the motions  
except those seeking a  
9 bill of particulars and further  
discovery, which will be  
10 disposed of in another opinion.

11 The first motion was made on  
behalf of all individual

12 defendants and is to dismiss the  
indictment for improperly  
13 indicting defendants under 18 U.S.C.  
§§1341 and 1342.

14 Defendants' argument is when  
Congress passes specific  
15 legislation dealing with a new subject  
and makes specified  
16 conduct criminal, resort may no longer  
be had to the mail  
17 fraud statute for prosecution. U.S.  
v. Maze, 414 U.S. 395  
18 (1974).

19 Here, according to defendants, the  
essence of the of-  
20 fense charged is illegal dumping of  
chemical waste into  
21 the lower Hudson Bay and at Lone Pine  
Landfill. This  
22 conduct is covered specifically by the  
Federal Water Pollu-



23 tion Control Act, 33 U.S.C., §1251, et  
24 seq., which has  
25 criminal and civil sanctions.

25 It is unnecessary to rule upon the  
validity or scope of

1 the principle of law upon which  
2 defendants rely, namely that  
3 the mail fraud statute cannot be  
4 utilized where the under-  
5 lying offense is the subject of  
6 specific legislation. See  
7 e.g. U.S. v. Henderson, 386 F. Supp.  
8 1048 (S.D.N.Y. 1974),  
9 U.S. v. Computer Science Corp., 511 F.  
10 Supp. 1125 (E.D. Va.  
11 1981).

12 Whatever its validity and scope,  
13 that rule is simply  
14 inapplicable here. The indictment  
15 does not charge an offense  
16 defined by the Federal Water Pollution  
17 Control Act. It  
18 charges an elaborate ongoing fraud.  
19 To be sure, one of the  
20 results of the fraudulent scheme  
21 alleged in the indictment

12 is the illegal pollution of waters  
covered by the Federal  
13 Water Pollution control Act. So the  
essence of the charge  
14 is the fraudulent scheme, not water  
pollution.

15 In Henderson, the indictment  
contained two counts  
16 charging an attempt to evade and  
defeat payment of income  
17 taxes, three counts charging use of  
the mails in furtherance  
18 of a scheme to defraud, and two counts  
charging subscribing  
19 to false and fraudulent statements  
which defendant did not  
20 believe to be true. As the Court  
pointed out, the scheme  
21 to defraud under the mail fraud counts  
involve the same

22 fraudulent conduct as was involved in  
the income tax fraud  
23 counts. A totally different situation  
is involved in the  
24 present case. In the first place, the  
indictment does not  
25 contain both mail fraud and pollution  
counts. More

1 important, unlike Henderson, the  
2 offenses charged in the  
3 indictment under the mail fraud  
4 statute are totally dissimi-  
5 lar to the offenses defined in the  
6 Water Pollution Control  
7 Act. Fraud is the essence of this  
8 indictment; befouling  
9 water is the essence of the Water  
10 Pollution Control Act.  
11 The criminal penalties imposed by the  
12 two statutes reflect  
13 the differences in the seriousness of  
14 the crimes charged.  
15 Therefore, defendants' motion on this  
16 ground will be denied.

17 The second motion was brought on  
18 behalf of all indiv-  
19 idual defendants to suppress evidence  
20 illegally seized by

11 the State of New Jersey and the fruits  
12 thereof and for a  
13 hearing thereon.

13 Defendants argue and point out  
14 quite correctly that the  
15 defendant has the right to have all  
16 evidence obtained from  
17 an illegal search and seizure  
18 suppressed. This rule is  
19 applied to prevent evidence obtained  
20 by state officers in  
21 an unreasonable search and seizure  
from being used against  
a defendant in a Federal criminal  
trial.

19 Elkins v. United States, 364 U.S.  
206 (1960).

20 Defendants assert that in this  
21 case evidence was  
seized pursuant to warrants which a  
state court found were

22 not based on probable cause. The  
evidence was subsequently  
23 turned over by the State to Federal  
authorities.

24 It is clear that the corporate  
officers, such as defend-  
25 ants, who maintained their place of  
employment at the

1 corporation's offices have standing,  
that is a sufficient  
2 expectation of privacy, to challenge a  
search of those of-  
3 fices. The three defendants were all  
directors, officers  
4 and owners of a closely held  
corporation and have the bene-  
5 fit of this ruling.

6 The issue of probable cause is  
discussed in United

7 States v. Nilsen, 482 F. Supp 1335  
(D.N.J. 1980). The

8 Court reviewing this, that is the  
Federal Court reviewing  
9 this issue need only consider facts  
set forth in the affi-

10 davit furnished to support the  
application for the search

11 warrants as in the first instance in  
deciding if there was



12 probable cause.

13       It is defendants' contention that  
14 the activities de-  
15 tailed in the affidavits from which  
16 the search warrants were  
17 issued by the State Court in this case  
18 were entirely inno-  
19 cent and consistent with SCP's  
20 business, and the events  
21 described were 18 days or more prior  
22 to the searches. When  
a court concludes that the information  
contained is not  
current, the evidence seized must be  
exlcuded. Rugendorf v.  
United States, 376 U.S. 528, rehearing  
den. 337 U.S. 940  
(1964). In U.S. v. Johnson, 561 F.2d  
285 (10th Cir. 1972),  
the court noted that when facts  
recited indicate activity

23 of a protracted and continuous nature,  
a course of conduct,  
24 the passage of time becomes less  
significant.

25 Defendants' argument, according to  
the Government, is

1 based on factually inaccurate  
premise. The Government has  
2 submitted affidavits tending to show  
that the Federal invest-  
3 gation of Lone Pine Landfill began in  
April 1981 and was  
4 based on information received from an  
informant totally  
5 independent of the State  
investigation. In response to the  
6 information, a Grand Jury subpoena was  
issued to SCP for  
7 production of records and the  
company's attorney, Donald J.  
8 Rinaldi, Esq., who had represented SCP  
in the 1978 State  
9 proceedings, allowed the Government to  
examine them and gave  
10 his permission to use them in the  
Federal investigation.

11 Defendants answer this contention  
12 by insisting that the  
13 information was furnished to the  
14 Government concerning Lone  
15 Pine before the Government began its  
16 investigation of Lone  
17 Pine and further argued that the  
18 consent given by Mr. Rinaldi  
19 was on behalf of the corporation and  
20 not on behalf of the  
21 individual defendants, and that Mr.  
Rinaldi was unaware that  
the Federal and State Government Task  
Force on Pollution had  
agreed to cooperate at the time or  
prior to the time when  
the subpoena was issued.

20 The Government's contention  
basically is, first, that  
21 SCP's consent and failure to contest  
the Grand Jury sub-

- 22 poena dissipates any possible taint in  
the State proceeding;
- 23 (2) it would be inappropriate to  
suppress the evidence in
- 24 view of the unrelated nature of the  
Lone Pine Landfill
- 25 investigation to the earlier State  
investigation; and (3)

1 suppression is unwarranted because  
probable cause did  
2 exist for the New Jersey search of the  
SCP Newark plant.

3 MR. WALDER: You said did exist?  
I think you meant did  
4 not.

5 THE COURT: I welcome that when  
you are correcting me.

6 I have examined carefully the  
records which defendants  
7 submitted in connection with the  
issuance of the 1978 search  
8 warrant by Judge Scalera, then the  
Criminal Assignment Judge  
9 of Essex County, and now the  
Assignment Judge of that county.  
10 After making that inquiry, I find it  
difficult to comprehend  
11 why after briefing and argument and an  
initial refusal to

• 12 suppress this evidence, Judge Walls,  
acting sua sponte,  
13 decided to enter an order suppressing  
the evidence. The  
14 nocturnal activities at SCP's Newark  
plant and the other  
15 facts recited in the affidavits  
supporting the issuance of  
16 the warrant certainly at first blush  
suggest the issuance  
17 of probable cause to me.  
18 In addition to the nighttime  
activity which was recited  
19 by the persons giving affidavits in  
support of the search  
20 warrant, affidavits with respect to  
trucks drawing up to  
21 the premises at Newark SCP, of piping  
waste material into  
22 the sewers and testing the sewers both  
above and below the

- 23 point where the piping was being done  
with noxious fumes
- 24 and odors coming from the sewers below  
the point of dis-
- 25 charge into the sewers while not being  
found above the



1 point of discharge. These and  
numerous other circumstances  
2 taken in conjunction with the issuance  
of the warrant seemed  
3 to me to provide, to have provided  
probable cause for the  
4 issuance of these warrants and were I  
Judge Walls, I would  
5 not have arrived at the same  
conclusion that he arrive at.  
6 I would have followed the original  
determination of Judge  
7 Scalera who authorized the issuance of  
the warrants on the  
8 basis of the facts presented to him  
which are contained in  
9 the reocrds in this case.

10 Further, the circumstances under  
which the Government  
11 obtained the documents were entirely  
proper, and I think they

12 are unaffected by any taint which may  
have existed when the  
13 State obtained the documents. These  
are not the product of  
14 an unlawful State search turned over  
to Federal authorities  
15 on a silver platter proscribed in  
Elkins, supra. The docu-  
16 ments were obtained through the lawful  
use of the Federal  
17 Grand Jury process. They involved an  
offense which the  
18 Federal Government began  
investigating, I conclude, inde-  
19 pendently of the State pollution  
investigation and which  
20 followed by years the State  
investigation out of which the  
21 search warrants had originally been  
issued. They were

22 produced with the consent of SCP  
counsel on behalf of the  
23 corporation, and I cannot believe that  
its consent would  
24 have been any different had he known  
that the Federal and  
25 State authorities had been working in  
conjunction, since

1    there was some limit on the use to  
2    which the Government  
3    could put the information which it  
4    obtained, and it is  
5    logical to think law-enforcement  
6    officials would exchange  
7    information.

8           If the attorney for SCP had not  
9    given his consent,  
10   there was nothing to prevent the  
11   Government from pursuing  
12   the subpoena which is at issue to  
13   obtain the documents for  
14   the Federal Grand Jury investigating  
15   Lone Pine Landfill  
16   situation. Thus, I think there is  
17   nothing to support that  
18   when the Government obtained the  
19   attorney's permission it  
20   was any way limited to the use which  
21   it could put the docu-

12 ments which it inspected.

13       The defendants' motion for  
14 suppression and for a fur-  
15 ther hearing will be denied.

16       As to the third motion, which is  
17 brought by all of the  
18 defendants, this is a motion to  
19 dismiss Counts 4 through 7  
20 and 9 through 14 for the reasons that  
21 the acts alleged are  
22 outside the scope of 17 U.S.C.     1341  
and 1342.

19       These counts allege a scheme to  
20 defraud and the mailing  
21 of an invoice to one of four different  
22 companies for the  
23 purpose of executing the scheme or  
24 artifice. On the basis  
25 of the indictment, mailings must have  
26 been made for the pur-

23 pose of executing the fraud. U.S. v.  
24 Tarnopol, 561 F. 2d

466 (3d Cir. 1977).

25 Here, according to the defendant,  
the fraud charged is

1 not to obtain money, but to defraud  
"regarding the trans-  
2 portation, treatment, recovery and  
disposal of industrial  
3 chemical wastes."

4 The test to be applied is set  
forth in United States v.

5 Brown, 583 F. 2d 659 (3d Cir. 1978);  
cert. den. 440 U.S. 909  
6 (1979).

7 ". . . if the mailing is a part  
of executing the fraud  
8 or is clearly related to the scheme, a  
mail fraud charge  
9 will lie, even though the mailing was  
also related to a  
10 business purpose." At 668.

11 The indictment alleges SCP falsely  
represented to gen-  
12 erators that their wastes would be  
lawfully transported and

13 disposed of. Thus, the invoices were  
bills for services  
14 which, contrary to defendants'  
representations, were not  
15 performed and were designed to procure  
payment for fraudu-  
16 lent activity. As such, they meet the  
Brown test as being  
17 clearly related to the fraudulent  
scheme even though they  
18 were related to a business purpose  
also.

19 Defendants' motion to dismiss  
Counts 4 through 7 and  
20 9 through 14 on this ground is denied.

21 The defendants' fourth motion is  
made on behalf of all  
22 of the defendants to require the  
Government to elect upon  
23 which counts of the indictment to  
proceed for the reason



24 that the indictment charges duplicate mailings.

25 Counts 19 through 21 charge mailings of special waste

1 manifests to DEP; Counts 8, 16, 17, 18  
2 charge mailings of  
3 virtually identical letters to SCP  
4 customers; Counts 4  
5 through 7 and 10 through 14 charge  
6 mailings of invoices to  
7 customers, three to Grumman Aerospace  
8 Corporation, three to  
9 Rohm and three to Nepera. It is clear  
10 that duplicate charges  
11 and excess mailings should not be  
charged in a single  
indictment. Here is separate mailing  
is in furtherance of  
the scheme to defraud constituting a  
separate violation of  
18 U.S.C. 1341. U.S. v. Joyce, 449  
F. 2d 9 (7th Cir. 1974),  
cert. den. 419 U.S. 1031 (1974).

Clearly the indictment in this  
case does not allege the

12 duplicate mailings. Each was a  
different mailing alleged to  
13 be in furtherance of the overall  
scheme.

14 Defendants' motion to require the  
Government to elect  
15 between them will be denied.

16 Motion No. 5 was filed on behalf  
of all defendants for  
17 a separate trial and on each of Counts  
2 through 21 or for  
18 an order requiring the Government to  
elect upon which counts  
19 to proceed.

20 In deciding whether to sever  
counts, a court must bal-  
21 ance the possibility of prejudice  
against the governmental  
22 interest and trial economy.

23 According to the defendants,  
prejudice will arise from

24 the trial of all these counts  
together, from embarrassment  
25 in presenting separate defenses,  
jury's use of evidence of

1 one crime to convict in another, the  
fact the jury may ac-  
2 cumulate the evidence to convict when  
it would not do so if  
3 counts were tried separately, and  
hostility engendered by  
4 charging several crimes.

5 Defendants seek to apply the  
analysis applicable to  
6 Rule 403 and Rule 404(b) to this  
motion.

7 To suggest that each of the  
substantive mail fraud  
8 counts should be tried separately  
borders on the absurd.

9 Each is dependent on proof of the same  
fraudulent scheme.

10 Each simply alleges a separate mailing  
in furtherance of the  
11 scheme, and each may unquestionably be  
proved as an overt

12 act in connection with the conspiracy  
charge contained in  
13 Count 1.

14 There is no basis for concluding  
that defendants would  
15 be prejudiced in any way by the  
joinder of these counts.  
16 The jury is perfectly capable of  
understanding that one  
17 underlying fraudulent scheme is  
alleged and that each mail-  
18 ing made pursuant to the scheme is a  
separate defense under  
19 the statute. A jury is also perfectly  
capable of understand-  
20 ing that as to Counts 2 through 21 the  
Government must not  
21 only prove the underlying fraudulent  
scheme but also the  
22 particular mailing involved.

- 23        Proper judicial administration  
compels trying these
- 24        counts together, and there is no  
countervailing prejudice.
- 25        Defendants' motion for a separate  
trial will be denied.

1           Motion No. 6 relates to the bill  
of particulars.

2           Motion No. 7 was brought on behalf  
the Defendant

3           Case and is a motion to dismiss the  
indictment on multiple  
4           grounds.

5           First Case alleges the Government  
had advised that

6           it has no envelopes to establish  
mailings nor has it disclosed

7           it has any other proofs to establish  
mailings.   SCP fre-

8           quently, according to Defendant Case,  
hand-delivered its

9           correspondence.   The SCP employees who  
were questioned before

10          the Grand Jury were not asked about  
hand-delivery as opposed

11          to mailing.   Therefore, the United  
States presented no proofs



12 to the Grand Jury as to the mailings.

13 According to Defendant Case, there  
14 should be disclosure

14 of what went on before the Grand Jury  
15 to fill the void under

15 Federal Rules of Criminal Procedure  
16 6(e)(3)(C)(ii) or else

16 an in camera inspection by the Court.

17 Secondly, Defendant Case states  
18 the Government fails to allege an  
19 object of

18 the alleged scheme to defraud. There  
19 must be a deprivation

19 of property rights or intangible  
20 rights but here no count

20 alleges either.

21 In effect, the indictment does not  
22 state what the vic-

22 tims were defrauded of.

23        Thirdly, Defendant Case urges that  
the Government  
24 charges a scheme to defraud the  
citizens of New Jersey for  
25 unspecified, intangible rights, as  
well as the New Jersey

1 DEP, Passaic Valley Sewerage Authority  
and generators of  
2 industrial chemical waste.

3 The mail fraud statute requires  
some fiduciary nexus  
4 between those defrauded where  
intangible rights have been  
5 affected. U.S. v. Margiotta, No. 82-  
1025, slip opinion  
6 (2d Cir. July 27, 1982). In that case  
the political party  
7 leader played such a dominant role in  
municipal and county  
8 government that he could be found to  
have a fiduciary duty  
9 to the citizens of the municipality  
and the county  
10 Finally, Defendant Case urges that  
the use of the mails  
11 was not essential to the scheme or  
artifice to defraud but

12 was merely employed for the sake of  
convenience, again

13 citing U.S. v. Tarnopol.

14 In each case, according to the  
Defendant Case, the  
15 question is whether the mailings were  
sufficiently closely

16 related to the scheme to bring the  
conduct within the mail  
17 fraud statutes.

18 Turning to the first ground, proof  
of the use of the  
19 mails, the fact that the Government  
has no envelopes to  
20 establish mailings or that SCP's  
employees who testified  
21 before the Grand Jury were not asked  
about mailings is not  
22 sufficient justification to conclude  
that the Grand Jury

23 did not have before it proof that the  
matter relied on as  
24 mailings were in fact mailed. There  
are a number of other  
25 ways in which that element of the  
offense can be proved.

1 If there is an absence of the proof at  
the trial, some or  
2 all of the counts can be dismissed.  
It is not ground to  
3 permit disclosure of Grand Jury  
proceedings or dismissal.

4 However, I will examine in camera  
Grand Jury testimony  
5 provided by the Assistant United  
States Attorney in order to  
6 determine that there was in fact  
evidence of mailing pre-  
7 sented to the Grand Jury, but unless I  
find to the contrary  
8 after such examination, this will not  
constitute a grounds  
9 for dismissal.

10 As to the object of the  
conspiracy, that is clearly  
11 alleged, which is namely to make false  
statements to induce

12 generators and public entities to  
believe the defendants  
13 were disposing of hazardous wastes  
legally, all so that  
14 defendants could continue their  
business and continue to  
15 charge the generators. The object of  
the conspiracy is  
16 properly alleged.

17 As to the scheme to defraud  
citizens of New Jersey,  
18 there is a plain and direct nexus  
between defendants and  
19 the three categories of entities which  
are alleged to have  
20 been the victims of the fraud; namely,  
the generators with  
21 whom defendants contracted, the  
Passaic Valley Sewerage  
22 Commission whose facilities it sued to  
dispose of industrial

.23 wastes, and the DEP from which SCP  
received its permit,  
24 which regulated SCP's operations, and  
to which SCP reported  
25 after the hazardous waste manifest  
system went into effect.



1        Only with respect to the fraud  
against the citizens of  
2    New Jersey does the nexus become more  
doubtful. U.S. v.  
3 Margiotta, supra, Judge Kaufman, noted  
that a public offi-  
4    cial may be prosecuted under 18 U.S.C.  
§1341 when his  
5    alleged scheme to defraud has as its  
sole object the  
6    deprivation of intangible and abstract  
political and civil  
7    rights of the general citizen. Slip  
opinion at 4164.

8        In that case an influential  
political party leader  
9    holding no public office was charged  
with mail fraud for  
10    arranging for the hiring of a  
particular insurance broker

11 by a municipality and county in  
consideration of the broker  
12 distributing 50 percent of his  
commission as directed by  
13 the party leader. The court stated  
that the case raised  
14 the question whether such a person  
owes a fiduciary duty to  
15 the citizenry not to deprive it of  
certain political rights  
16 so as to lay the basis for a mail  
fraud prosecution. The  
17 clear implication was that if a person  
were neither a public  
18 official nor a person participating  
substantially in the  
19 operation of the government, he would  
not owe a fiduciary  
20 duty to the public at large not to  
deprive it of certain

21 intangible political rights. Thus he  
22 would not owe duties  
23 to the public which might lay the  
24 basis for mail fraud  
25 prosecution.

26 In the present case, defendants  
27 were not public offi-  
28 cials nor did they participate  
29 substantially in the

1 operation of the government. They  
simply dealt with certain  
2 government agencies.

3 Consequently, if the indictment  
charged only the defend-  
4 ants conducted a fraudulent scheme,  
the object of which was  
5 to deprive the citizens of New Jersey  
of their right not to  
6 have the state water polluted in  
violation of the laws, the  
7 indictment might well be subject to  
dismissal under the  
8 principle of the Margiotta case.

9 However, the indictment also  
charges fraud on two  
10 governmental agencies and on  
generators of hazardous waste.  
11 Insofar as they are concerned, the  
indictment alleges a

12 nexus between the defendants and the  
defrauded entities

13 which supports a Section 1341 charge.

14       The fraud on the public  
allegations of the indictment  
15 may be viewed as rhetorical  
surplusage. That language should  
16 be stricken from the indictment, and  
the Government will be  
17 instructed not to argue to the jury  
fraud on the public as  
18 distinguished from fraud on public  
entities. With that  
19 exception, defendants' motion to  
dismiss on object of the  
20 conspiracy grounds will be denied.

21       Defendant Case moves for a  
severance from the other  
22 defendants. He contends that except  
for three special

- 23 waste manifests signed by Barnes and  
certain unspecified
- 24 deliverance to Lone Pine, no unlawful  
agreement is alleged
- 25 to exist between him and Barnes, and  
Case anticipates the

1 Government will attempt to prove  
relationship between Barnes  
2 and Sigmond not involving Case. Case  
also anticipates the  
3 Government will attempt to prove Rule  
405(b) offenses as  
4 to Barnes.

5 He urges that evidence related to  
a different time span  
6 will be prejudicial as will joinder of  
Case with persons  
7 with whom he has had no unlawful  
relationship.

8 Finally he contends no facts are  
alleged which suggest  
9 unlawful conspiracy between him and  
Barnes and thus multiple  
10 conspiracies are involved as  
prohibited in Kotteokus v.  
11 United States, 328 U.S. 750 (1945) and  
U.S. v. Camiel,

12 No. 81-2933 (3d Cir. September 7,  
1982).

13 No basis has been established to  
14 sever Case's trial  
15 from the trial of the other  
16 defendants.

17 Rule 8(b) of the Federal Rules of  
18 Criminal Procedure  
19 says that it is proper to charge in a  
20 single indictment  
21 persons alleged to have participated  
22 in the same acts or  
23 transactions. That is clearly the  
24 case here. In a con-  
25 spiracy charge defendants should be  
26 tried together.

27 Under Rule 14 as severance may be  
28 granted if prejudice  
29 is shown.

30 There is nothing to show  
31 prejudice. There is nothing to



23 show that there were separate  
conspiracies involving some but  
24 not all of the defendants. Thus,  
Kotteokus v. United States,  
25 supra, and U.S. v. Camiel, supra, are  
not applicable.

1        Even if, as Case suggests, he was  
not part of the con-  
2        spiracy during the entire time of its  
existence, that is not  
3        a reason to sever.

4        If the United States offers proof  
of prior crimes under  
5        404(b) against co-defendants, I can  
attend to that at the  
6        time of the offer and determine under  
Rule 403 whether there  
7        would be undue prejudice.

8        If there would be, the evidence  
can be excluded, and if  
9        not, it would be admitted.

10       The present showing or rather lack  
of showing does not  
11       require a severance.

12       Case's motion for a severance will  
be denied, as the

13 consideration of sound judicial  
administration requires a  
14 joint trial and there is no prospect  
of undue prejudice  
15 that has been established.

16 Motion 9 is for a bill of  
particulars.

17 I am going to give you a letter on  
the motions for a  
18 bill of particulars rather than argue  
them out. If you want  
19 to add anything, let me have it in the  
next few days.

20 Otherwise I will just give you a  
disposition by mail, not  
21 by deliver.

22 - - -



OFFICE OF THE  
SOLICITOR GENERAL  
STATE OF NEW JERSEY

STATE OF NEW JERSEY

OFFICE OF THE  
SOLICITOR GENERAL

**APPENDIX K**

NEW JERSEY STATE

IN THE SUPREME COURT OF THE STATE OF NEW JERSEY  
IN AND FOR THE COUNTY OF MIDDLESEX  
STATE OF NEW JERSEY, Plaintiff,  
vs.  
JOHN J. HENRY, Defendant.  
Case No. 12-12345-6789  
JURY TRIAL  
VERDICT  
The jury has heard the evidence and the law as given by the court. The jury has deliberated and reached a verdict. The verdict is as follows:  
The defendant is guilty of the crime charged in the indictment.  
The defendant is sentenced to the term of years and days specified in the indictment.  
The costs of the proceedings are awarded to the plaintiff.  
The jury has also heard the evidence and the law as given by the court. The jury has deliberated and reached a verdict. The verdict is as follows:  
The defendant is guilty of the crime charged in the indictment.  
The defendant is sentenced to the term of years and days specified in the indictment.  
The costs of the proceedings are awarded to the plaintiff.



SUPERIOR COURT OF  
NEW JERSEY  
COUNTY OF ESSEX

STATE OF NEW JERSEY :  
COUNTY OF ESSEX :SS. AFFIDAVIT  
:

I, WAYNE SMITH, Police Officer for  
the Newark Police Department, of full age,  
being duly sworn on my oath according to  
law deposes and says:

1. On June 22, 1978, at 8:16 p.m.,  
while assigned to mobile patrol unit  
number 317, I was dispatched to 411 Wilson  
Avenue, Newark, in response to a burglar  
alarm for a suspected break and entry.

2. Upon arrival at 411 Wilson  
Avenue, I met Robert W. Flett who was a  
guard on the premises. Because it was a  
silent alarm, Robert W. Flett was not  
aware of the alarm. I told him about the  
alarm at this time. I thought it strange  
that Mr. Flett was wearing a "gas mask" as  
used by the armed forces.

3. Mr. Flett and myself went to the area where the alarm was located; I observed that the ceiling of this location had been broken into and that the door to this office area was unlocked.

4. Mr. Flett told me that (1) the office area was secured and locked at the end of the work day at approximately 5:00 p.m. and (2) the ceiling was not broken as it was at this time.

5. I then commenced a search of the building complex for the suspect. I was accompanied by Robert W. Flett.

6. During our search of the building complex, I observed several hundred 55 gallon drums in the front building. I observed that these barrels were filled.

7. During the search for the suspect, I observed an area located between the front building and a green one-story garage like structure to the rear of this building. I observed a hose,



approximately 3" in diameter, leading from the outside rear wall of this green building to a hole, approximately 3 feet by 4 feet.

8. I observed water running into this hole from another direction through a drain ditch cut into the floor. Because of this, I believe that this hole led to the sewers.

9. I have been assigned to the 317 district which covers 411 Wilson Avenue and the surrounding area for approximately three years.

10. On numerous occasions, I smelled pungent odors in the area of 411 Wilson Avenue.

11. Because of my prior employment as a senior lab technician at Engelhardt Industries in Newark, I determined that the odors were from chemicals.

12. On various occasions, I observed a connection between tanker trucks coming

to 411 Wilson Avenue during night time hours and the pungent odors which I detected coming from the manhole cover in front of 411 Wilson Avenue and the manhole cover immediately to the East of the first manhole cover.

13. On these occasions, I also checked the manhole cover immediately to the West of 411 Wilson Avenue; it did not have the same chemical odors as the manhole covers to the East of 411 Wilson Avenue as described in paragraph #12.

14. I made the observations described in paragraphs #12 and #13 on the following dates:

January 26, 1978 11:00 p.m.

January 27, 1978 6:50 p.m.

February 1, 1978 5:00 a.m.

February 3, 1978 12:30 a.m.

February 19, 1978 12:50 a.m.

March 23, 1978 5:50 p.m.

April 26, 1978 3:00 a.m. (approx.)

---

Wayne Smith  
Police Officer

Sworn and subscribed to  
before me this       day  
of July, 1978.

---

THE STATE OF NEW YORK  
IN SENATE  
January 12, 1892.

REPORT  
OF THE  
COMMISSIONER OF THE LAND OFFICE  
IN RESPONSE TO A RESOLUTION  
PASSED BY THE SENATE  
MAY 1, 1891.

ALBANY:  
PUBLISHED BY THE  
J. B. LIPPINCOTT COMPANY,  
1892.

THE STATE OF NEW YORK  
IN SENATE  
January 12, 1892.

REPORT  
OF THE  
COMMISSIONER OF THE LAND OFFICE  
IN RESPONSE TO A RESOLUTION  
PASSED BY THE SENATE  
MAY 1, 1891.

APPENDIX L



SUPERIOR COURT OF  
NEW JERSEY  
LAW DIVISION:  
CRIMINAL  
ESSEX COUNTY

STATE OF NEW JERSEY )  
COUNTY OF ESSEX ) ss. AFFIDAVIT OF  
SEARCH WARRANT  
Search Warrant  
#AG7-10-77

Investigator RICHARD CHILDS, of full  
age, being duly sworn according to law,  
upon his oath deposes and says:

I

I am a duly constituted State Investigator in the Office of the New Jersey Attorney General, Division of Criminal Justice. I have been a Law Enforcement Officer for a period of approximately ten (10) years divided between the Newark Police Department and the Economic Crime Section of the Division of Criminal Justice. Throughout this period, I have been involved in matters involving major crimes, investigative auditing, embezzlements, frauds and economic crimes.

## II

I want to search (A) the buildings located at 411 Wilson Avenue, Newark, New Jersey, (B) the yard area, which is enclosed by a fence, located to the side and rear of the said building complex located at 411 Wilson Avenue, Newark, New Jersey (C) any individuals, within the building complex and yard area, who are assisting in and within close proximity to the off-loading of chemicals at the locations enumerated above in objects "A" and "B", and (D) any tanker and truck which is engaged in the offloading of chemicals at the time when warrants are executed.

I want to search the above buildings, trucks and yard area because I believe that chemical wastes are being pumped into the public sewer systems contrary to the law. I believe that tanker trucks are being used to offload these chemicals directly into the sewer by means of hoses



and/or pipes connecting the tanker truck to an interior portion of the building complex where an open hole leading to a sewer is located. I believe this to be a public nuisance, in violation of N.J.S.A. 2A:85-1.

### III

That the facts tending to establish the grounds for this application and the probable cause of my belief as aforesaid, are as follows:

1. I conducted a surveillance of the Scientific Chemical Processing facility located at 411 Wilson Avenue in Newark, New Jersey, on Tuesday, June 13, 1978 from 7:00 o'clock a.m. to 5:00 o'clock a.m. Wednesday, June 14, 1978. This was a mobile and ambulatory surveillance.

2. At 7:15 p.m. on June 13, 1978, I observed a cab and tanker enter the Scientific Chemical Processing facility (hereinafter referred to a "facility"). It was a silver tanker in color.

3. At 7:25 p.m. I positioned myself to the rear of the "facility" and with binoculars observed the silver tanker standing alongside a two story, brick building which was greenish in color and is labeled "A" on the attached photograph. This green building is located in the easterly portion of the building complex.

4. I observed that the cab which was pulling the tanker had the name "Scientific Chemical, Carlstadt, New Jersey" printed on the door. The silver tanker bore number 365005 on its rear surface.

5. I observed the top vents of the tanker in an open position and a hose from the tanker running from the tanker, along the ground and then to another section of the building complex.

6. I observed that the building complex is a grouping of various structures apparently joined in a row-like

fashion. One portion of the complex is the two-story greenish hued building referred to in paragraph 3 above. Another portion is a one-story garage-like structure, also of greenish hue, with garage doors facing the rear of the main building complex into the yard area of the facility.

7. I remained in the area, keeping the rear of the building complex under surveillance until approximately 8:30 p.m. on this date, June 13, 1978. I observed the tanker and cab, heretofore described in paragraph number 4 above, remain in the same position as described in paragraph 3 above.

8. I have reviewed temporary operating authorizations issued by the New Jersey Department of Environmental Protection to Scientific Chemical Processing, Inc. Permits were issued on May 9, 1978 for two locations: 411 Wilson Avenue in

Newark and 216 Paterson Plant Road in .  
Carlstadt, New Jersey.

9. The operating authorizations are to conduct special waste facilities to transfer, store, reprocess, reclaim, recover, blend and treat chemical wastes.

10. Based upon my observations and the statements set forth in the accompanying affidavits of Investigator Nicholas Russo and Police Officer Wayne Smith, whose affidavits are made part of this application for the issuance of search warrants, I have probable cause to believe that tanker trucks are illegally disposing of chemical wastes under cover of darkness into the sewers transversing the City of Newark.

#### IV

Search warrants are sought for the following entities:

A. BUILDING COMPLEX

The building complex is located at 411 Wilson Avenue in Newark, New Jersey; this complex is situated on the northerly side of Wilson Avenue subjacent to the Wilson Avenue underpass. The complex is composed of contiguous buildings and are of red brick composition and are two-stories each. The complex is marked with the number 411 positioned above the second story windows on the most easterly portion of the complex. The complex has four (4) entrance doors facing Wilson Avenue. The rear of the building complex is predominantly composed of contiguous buildings, two-stories in height and of red brick composition toward the easterly section is a two-story aqua structure of concrete composition which protrudes northerly from the main complex but which appears to be attached to the main red brick complex heretofore described to the west of this two-story aqua structure is a one-story

garage like structure which is also aqua in color. Located on the north face of this garage-like structure is an opening the approximate size of a garage entrance way. To the west of this garage door opening is a pedestrian entrance door leading to the inside of this one-story aqua structure.

Although there are four (4) entrance ways facing the Wilson Avenue overpass, it is known that the interior portions of the building complex is a warehouse-like facility with large areas of open storage not directly correlated to each entrance door.

#### B. YARD AREA

The yard area located to the northerly and westerly directions immediately contiguous to the building complex known as 411 Wilson Avenue in Newark. The yard area is enclosed by a cyclone fence approximately eight (8) feet in height. The fence is topped with three (3) strands

of barbed wire. The yard area has property facing Wilson Avenue approximately 500 feet in length; it has a depth of approximately 700 feet in length; it is irregularly rectangular in shape. Within this yard area are located various warehouse-like structures, yard vehicles (including tankers, trucks, forklifts and other motorized vehicles).

#### C. TANKER VEHICLES

Any and all tanker vehicles parked near the two (2) green-hued buildings described in paragraph IV (A) above. On June 13, 1978, I observed a large silver tanker with an estimated capacity of 8,000 gallons which bore identification number 365005 and which was being pulled by a cab bearing the name "Scientific Chemical, Carlstadt, New Jersey".

It is requested that authorization be given to search this silver tanker and cab, as well as any other tanker or



tankers which park near the green hued buildings which are believed to be the specific areas where chemical offloading is occurring.

#### D. INDIVIDUALS

Those individuals who are within the area of the green hued buildings when a tanker vehicle is connected to the hose and/or pipe heretofore described.

Any individual who is either a driver or passenger of a tanker vehicle which is connected to the hose and/or pipe heretofore described.

#### V

I am making application for search warrants in order to seize the following items:

- (1) Samples of substances being transported and/or stored in tanker vehicles.
- (2) Bills of lading, New Jersey Department of Environmental Protection manifest reports and other documentary evidence which would indicate the types of substances being



transported, stored, refined, reprocessed, treated or recovered by Scientific Chemical Processing.

- (3) Bills of lading, vendor contracts, invoices, and other documentary evidence showing the ultimate disposition of chemical wastes being accepted by Scientific Chemical Processing and other subsidiaries and subdivisions which at this stage are unknown.
- (4) Samples of substances being discarded into the sewers of Newark.

## VI

I have observed that the complained of activity occurs during the evening and nocturnal hours. I personally observed the suspect activity on June 13, 1978 at approximately 7:25 p.m. The accompanying affidavit of Police Officer Wayne Smith states that he has observed the complained of activity on many occasions usually during the periods of dusk and darkness.

In that the suspected illegal activity occurs during the non-daylight hours, it is requested that the Court authorize

the execution of the search warrants at any hour of the day or night.

Wherefore deponent prays that search warrants may be issued authorizing a search of the aforesaid persons, vehicles, premises and such persons as may be in and upon such premises and vehicles in the manner provided by law.

---

Richard Childs,  
Investigator

Sworn and subscribed to  
before me this        day  
of                      , 1978.

---

Judge of the Superior Court

## APPENDIX M



SUPERIOR COURT OF  
NEW JERSEY  
COUNTY OF ESSEX

STATE OF NEW JERSEY    )  
                              ) SS.   AFFIDAVIT  
COUNTY OF ESSEX        )

I, Nicholas M. Russo, Investigator  
for the New Jersey Attorney General  
Office, Division of Criminal Justice, of  
full age, being duly sworn on my oath  
according to law, deposes and says:

1. I conducted a surveillance of the  
Scientific Chemical Processing Facility  
located at 411 Wilson Avenue in Newark,  
New Jersey on Tuesday from 7:00 o'clock  
a.m., June 13, 1978 and to 5:00 o'clock  
a.m., Wednesday, June 14, 1978. This was  
a mobile and ambulatory surveillance.

2. Between 7:40 p.m. and 7:46 p.m.,  
I walked Wilson Avenue for the length of  
the building complex known to house  
Scientific Chemical Processing and known

to me as 411 Wilson Avenue.

3. I observed a manhole cover directly in front of 411 Wilson Avenue and in close proximity to the most easterly entrance door.

4. At 7:41 p.m. and 7:43 p.m., while standing near this manhole cover, I heard what seemed to be the sounds of gushing liquids coming from the manhole cover. I detected the odor of chemicals coming directly from the manhole cover.

---

Nicholas M. Russo,  
Investigator

Sworn and subscribed to  
before me this            day of  
July, 1978.

---

## APPENDIX N

2



SUPERIOR COURT OF  
NEW JERSEY  
LAW DIVISION  
ESSEX COUNTY

STATE OF NEW JERSEY )  
 )SS CRIMINAL SEARCH  
COUNTY OF ESSEX ) WARRANT

To Investigator Richard Childs, any officer of the New Jersey Division of Criminal Justice, any officer of the Newark Police Department or any officer of any law enforcement agency having jurisdiction.

1. This matter being opened to the Court by Richard Childs on application for the issuance of search warrants for the building complex described below and the Court having reviewed the affidavits of Richard Childs, Investigator Nicholas Russo and Police Officer Wayne Smith and being satisfied therefrom that located thereon are:

- (1) Samples of substances being transported and/or stored in tanker vehicles.

- (2) Bills of lading, New Jersey Department of Environmental Protection manifest reports and other documentary evidence which would indicate the types of substances being transported, stored, refined, reprocessed, treated, or recovered by Scientific Chemical Processing.
- (3) Bills of lading, vendor contracts invoices, and other documentary evidence showing the ultimate disposition of chemical wastes being accepted by Scientific Chemical Processing and other subsidiaries and subdivisions which at this stage are unknown.
- (4) Samples of substances being discarded into the sewers of Newark.

and that probable cause exists for the issuance of such warrant;

2. You are hereby commanded to search the building complex described below and to serve a copy of the warrant on such person or on the person in charge or control of such building complex;

3. You are hereby ordered, in the event you seize any of the described articles, to give a receipt for the property so seized to the person from whom it

was taken or in whose possession it was found, or in the absence of such person to leave a copy of this warrant together with such receipt in or upon the said premises from which the property is taken.

4. You are authorized to execute this warrant within ten (10) days from the issuance hereof, at any hour of the day or night and thereafter to forthwith make prompt return to me with a written inventory of the property seized hereunder.

5. The following is a description of the building complex to be searched:

The building complex is located at 411 Wilson Avenue in Newark, New Jersey; this complex is situated on the northerly side of Wilson Avenue subjacent to the Wilson Avenue underpass. The complex is composed of contiguous buildings and are of red brick composition and are two-stories each. The complex is marked with the

number 411 positioned above the second story windows on the most easterly portion of the complex. The complex has four (4) entrance doors facing Wilson Avenue. The rear of the building complex is predominately composed of contiguous buildings, two stories in height and, of red brick composition toward the easterly section, is a two story aqua structure of concrete composition which protrudes northerly from the main complex but which appears to be attached to the main red brick complex heretofore described; to the west of this two-story aqua structure is a one-story garage-like structure which is also aqua in color. Located on the north face of this garage-like structure is an opening the approximate size of a garage entrance way. To the west of this garage door opening is a pedes-

trian entrance door leading to the  
inside of this one-story aqua struc-  
ture.

Although there are four (4) entrance  
ways facing the Wilson Avenue overpass, it  
is known that the interior portions of the  
building complex is a warehouse-like fac-  
ility with large areas of open storage not  
directly correlated to each entrance door.

6. Given and issued under my hand at  
the Cith of Newark at 2:50 o'clock p.m.,  
this 10th day of July, 1978.

\_\_\_\_\_  
Nicholas Scalera, l/s  
J.S.C.  
Judge of the Superior  
Court.

SUPERIOR COURT OF  
NEW JERSEY  
LAW DIVISION  
ESSEX COUNTY

STATE OF NEW JERSEY )  
 )SS CRIMINAL SEARCH  
COUNTY OF ESSEX ) WARRANT

To Investigator Richard Childs, any officer of the New Jersey Division of Criminal Justice, any officer of the Newark Police Department or any officer of any law enforcement agency having jurisdiction.

1. This matter being opened to the Court by Richard Childs on application for the issuance of search warrants for the building complex described below and the Court having reviewed the affidavits of Richard Childs, and being satisfied therefrom that probable cause exists to believe a violation of N.J.S.A. 2A:85-1 exists, that is the existence of a public nuisance and that located thereon are:

(1) The pit area, hereto described,

located between the one-story garage-like aqua colored structure described in paragraph IV and the main portion of the building complex fronting on Wilson Avenue in Newark.

- (2) The drainage trenches used to channel water and for chemicals to the pit area heretofore described.
- (3) The hoses and pipes used to channel the flow of chemicals from the rear of the building to the pit area heretofore described.
- (4) The interior areas at 411 Wilson Avenue used to store 55 gallon drums of chemicals.

and that probable cause exists for issuance of such warrant;

2. You are hereby commanded to search and photograph the building complex described below and to serve a copy of the warrant on such person or on the person in charge or control of such building complex;

(3) You are hereby ordered, in the event you seize any of the described articles, to give a receipt for the property so seized to the person from whom it

was taken or in which possession it was found, or in the absence of such person to leave a copy of this warrant together with such receipt in or upon the said premises from which the property is taken.

4. You are authorized to execute this warrant within ten (10) days from the issuance thereof, between the hours of 7:00 a.m. and 6:00 p.m. and thereafter to forthwith make prompt return to me with a written inventory of the property seized hereunder.

5. The following is a description of the building complex to be searched:

The building complex is located at 411 Wilson Avenue in Newark, New Jersey; this complex is situated on the northerly side of Wilson Avenue subjacent to the Wilson Avenue underpass. The complex is composed of contiguous buildings and are of red brick composition and are two-stories



each. The complex is marked with the number 411 positioned above the second story windows on the most easterly portion of the complex. The complex has four (4) entrance doors facing Wilson Avenue. The rear of the building complex is predominantly composed of contiguous buildings, two stories in height and, of red brick composition toward the easterly section, is a two story aqua structure of concrete composition which protrudes northerly from the main complex but which appears to be attached to the main red brick complex heretofore described; to the west of this two-story aqua structure is a one-story garage-like structure which is also aqua in color. Located on the north face of this garage-like structure is an opening the approximate size of a garage entrance way. To the west of this

garage door opening is a pedestrian entrance door leading to the inside of this one-story aqua structure.

Although there are four (4) entrance ways facing the Wilson Avenue overpass, it is known that the interior portions of the building complex is a warehouse-like facility with large areas of open storage not directly correlated to each entrance door.

6. Given and issued under my hand at  
the City of Newark at 9:00 o'clock a.m.,  
this 27th day of July, 1978.

1/s

Nicholas Scalera,  
J.S.C.  
Judge of the Superior  
Court.

SUPERIOR COURT OF  
NEW JERSEY  
LAW DIVISION  
ESSEX COUNTY

STATE OF NEW JERSEY )  
COUNTY OF ESSEX )SS CRIMINAL SEARCH  
WARRANT

To Investigator Richard Childs, any officer of the New Jersey Division of Criminal Justice, any officer of the Newark Police Department or any officer of any law enforcement agency having jurisdiction.

1. This matter being opened to the Court by Richard Childs on application for the issuance of search warrants for the building complex described below and the Court having reviewed the affidavits of Richard Childs, and being satisfied therefore that probable cause of a violation of N.J.S.A. 2A:85-1 exists and that located thereon are:

- (1) Sample bottles containing various chemicals. These bottles are located on the second floor of 411 Wilson Avenue and are located

on portable shelving at that location. These sample bottles have labels affixed thereto which setforth the date on which chemicals were received, the name of the driver and perhaps the name of the individual who took the sample.

and that probable cause exists for the issuance of such warrant;

2. You are hereby commanded to search and photograph the building complex described below and to serve a copy of the warrant on such person or on the person in charge or control of such building complex;

(3) You are hereby ordered, in the event you seize any of the described articles, to give a receipt for the property so seized to the person from whom it was taken or in which possession it was found, or in the absence of such person to leave a copy of this warrant together with such receipt in or upon the said premises from which the property is taken.

4. You are authorized to execute this warrant within ten (10) days from the issuance thereof, between the hours of 7:00 a.m. and 6:00 p.m. and thereafter to forthwith make prompt return to me with a written inventory of the property seized hereunder.

5. The following is a description of the building complex to be searched:

The building complex is located at 411 Wilson Avenue in Newark, New Jersey; this complex is situated on the northerly side of Wilson Avenue subjacent to the Wilson Avenue underpass. The complex is composed of contiguous buildings and are of red brick composition and are two-stories each. The complex is marked with the number 411 positioned above the second story windows on the most easterly portion of the complex. The complex has four (4) entrance doors facing Wilson

Avenue. The rear of the building complex is predominately composed of contiguous building, two stories in height and, of red brick composition toward the easterly section, is a two story aqua structure of concrete composition which protrudes northerly from the main complex but which appears to be attached to the main red brick complex heretofore described; to the west of this two-story aqua structure is a one-story garage-like structure which is also aqua in color.

Located on the north of this garage-like structure is an opening the approximate size of a garage entrance way. To the west of this garage door opening is a pedestrian entrance door leading to the inside of this one-story aqua structure.

6. Given and issued under my hand at the City of Newark at 9:10 o'clock a.m.,

this 11th day of September, 1978.

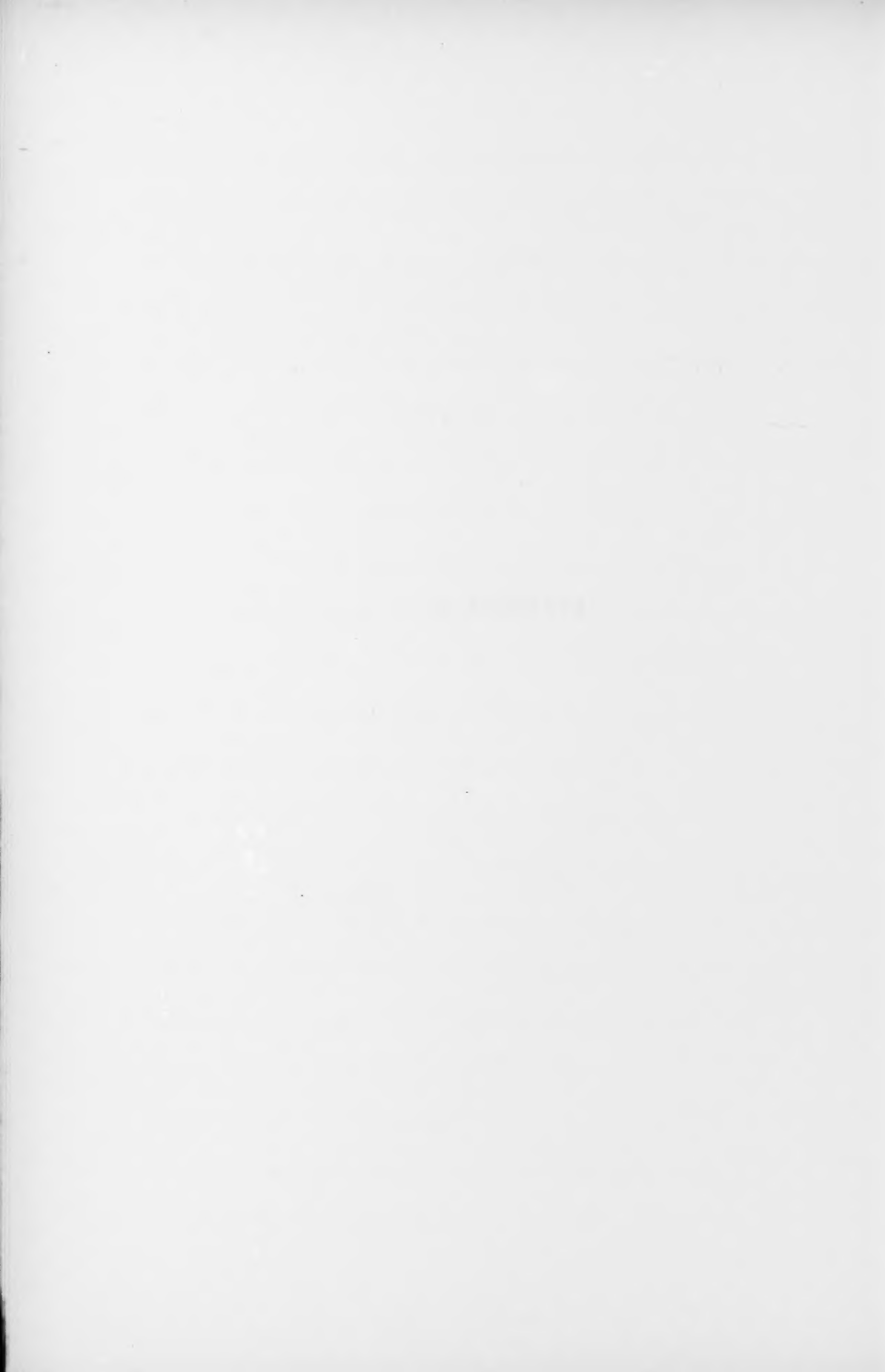
1/s

Nicholas Scalera  
J.S.C.  
Judge of the Superior  
Court.





## APPENDIX O



STEIN, BLIABLIAS, MCGUIRE & PANTAGES  
11 Commerce Street  
Newark, New Jersey 07102  
(201)622-3100  
Attorneys for Defendant  
Leif R. Sigmond

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

Plaintiff	) Hon. Dickinson
UNITED STATES OF AMERICA	) R. Debevoise
	)
v.	) Criminal No.
	) 82-200(DRD)
Defendant	)
	) MOTION TO
HERBERT G. CASE, JR.	) DISMISS
MACK BARNES, LEIF R.	) INDICTMENT, FOR
SIGMOND, and SCIENTIFIC	) SUPPRESSION,
CHEMICAL PROCESSING	) FOR A BILL OF
COMPANY, INC.	) PARTICULARS AND
	) FOR OTHER
	) RELIEF

TO: HONORABLE HUNT W. DUMOND  
United States Attorney for  
District of New Jersey  
970 Broad Street  
Newark, New Jersey 07102  
ATT: Charles S. Crandall  
Assistant United States Attorney

SIR:

PLEASE TAKE NOTICE, that on Monday,  
November 1, 1982, at 10:00 o'clock in the  
forenoon, or as soon thereafter as counsel  
may be heard, the undersigned attorneys  
for defendants, Leif R. Sigmond, Herbert

G. Case, Jr. and Mack Barnes, shall move before the Honorable Dickinson R.

Debevoise, Judge of the United States District Court for the District of New Jersey, at the United States Court House and Post Office, Trenton, New Jersey, for the following relief:

1. For an Order that the indictment be dismissed on grounds that the United States improperly indicted the defendants under 18 U.S.C. §§1341 and 1342.

2. For an Order that all evidence illegally seized by the State of New Jersey and the fruits thereof be suppressed as evidence against the defendants in these criminal proceedings and, further, that the defendants be granted a hearing thereon.

3. For an Order that Counts 4, 5, 6, 7, 9, 10, 11, 12, 13 and 14 of the indictment be dismissed on the grounds that the acts alleged in those counts are outside

the scope of 17 U.S.C. §§1341 and 1342.

4. For an Order that the United States be required to elect upon which counts of the indictment to proceed as the indictment charges duplicate mailings.

5. For an Order, pursuant to Rule 14 of the Rules of Criminal Procedure, granting the defendants a separate trial as to each of Counts 2 through 21 of the indictment or, in the alternative, requiring the United States to elect upon which counts to proceed on the grounds that the defendants will suffer prejudice from the joint trial of the offenses in said counts.

6. For an Order requiring the United States to furnish the defendants, within a time to be therein specified, a written bill of particulars as set forth in Schedule A attached hereto.

In support of this motion, the defendants will rely upon the attached brief

and exhibits submitted simultaneously  
herewith.

STEIN, BLIABLIAS, MCGUIRE  
& PANTAGES  
Attorneys for Defendant Leif  
R. Sigmond

WALDER, SONDAK, BERKELEY  
& BROGAN  
Attorneys for Defendant  
Herbert G. Case, Jr.

MINICHINO, MAUTONE &  
COLASANTI  
Attorneys for Defendant  
Mack Barnes

By: \_\_\_\_\_ l/s  
DINO D. BLIABLIAS  
On Behalf of All Defendants

Dated: October 15, 1982

SCHEDULE  
BILL OF PARTICULARS

Defendants, Leif R. Sigmond, Herbert G. Case, Jr. and Mack Barnes, respectfully request a written bill of particulars as to the following matters alleged in the indictment herein, as follows:

1. As to each incident of unlawful dumping referred to in Paragraph 15 of Count One of the indictment, set forth the exact citation of each and every federal or state statute, regulation or other authority by which the dumping was alleged to have been made unlawful.

2. As to each incident of unlawful dumping referred to in Paragraph 15 of Count One of the indictment, state the name or chemical composition of each substance alleged to have been dumped.

3. As to each chemical substance or compound listed in bill of particular number 2 above, set forth the volume and chemical concentration of the chemical

substance or compound alleged to have been dumped.

4. As to each incident of unlawful dumping referred to in Paragraph 17 of Count One of the indictment, set forth the exact citation of each and every federal or state statute, regulation or other authority under which the dumping was alleged to have been made unlawful.

5. As to each incident of unlawful dumping referred to in Paragraph 17 of Count One of the indictment, set forth the name or chemical composition of each substance alleged to have been dumped.

6. As to each chemical substance or compound listed in bill of particular number 5 above, set forth the volume and chemical concentration of the chemical substance or compound alleged to have been dumped.



## APPENDIX P



UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : Criminal No.

vs. : 82-200

LEIF R. SIGMOND : JUDGMENT

Filed Mar.18, 1983

at 3 p.m.

Allyn Z. Lite

This cause having come on regularly for trial before the Court, with jury, and after due deliberation, the jury having returned a verdict of not guilty, on Counts 5, 6, 13, 14, 18, 19, 20 and 21, of the indictment.

It is, on this 18th day of March, 1983, ADJUDGED that the defendant is not guilty of the offense charged in the indictment, as to Counts 5, 6, 13, 14, 18, 19, 20 and 21.

1/s  
Dickinson R. Debevoise  
United States District  
Judge

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : Criminal No.  
vs. : 82-200  
HERBERT G. CASE, JR. : JUDGMENT

Filed Mar.18, 1983  
at 3 p.m.  
Allyn Z. Lite

This cause having come on regularly  
for trial before the Court, with jury, and  
after due deliberation, the jury having  
returned a verdict of not guilty, on  
Counts 5, 6, 13, 14 and 18, of the indict-  
ment.

It is, on this 18th day of March,  
1983, ADJUDGED that the defendant is not  
guilty of the offense charged in the  
indictment, as to Counts 5, 6, 13, 14 and  
18.

\_\_\_\_\_  
Dickinson R. Debevoise  
United States District  
Judge

1/s

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : Criminal No.  
vs. : 82-200  
MACK BARNES : JUDGMENT

Filed Mar.18, 1983  
at 3 p.m.  
Allyn Z. Lite

This cause having come on regularly for trial before the Court, with jury, and after due deliberation, the jury having returned a verdict of not guilty, on Counts 5, 6, 13, 14, 18 and 19, of the indictment.

It is, on this 18th day of March, 1983, ADJUDGED that the defendant is not guilty of the offense charged in the indictment, as to Counts 5, 6, 13, 14, 18 and 19.

1/s

Dickinson R. Debevoise  
United States District  
Judge

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

APPENDIX Q

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

MADEY R. F. 100-100

UNITED STATES DEPARTMENT OF COMMERCE  
BUREAU OF COMMERCE

OFFICE OF THE SECRETARY  
WASHINGTON, D. C.

January 10, 1917

Mr. J. M. Smith, Secretary of the Board of Trade

and General Chamber of Commerce, New York City

Dear Sir: I have the honor to acknowledge the receipt of your letter of the 7th inst.

relative to the proposed amendment to the tariff on wool.

The Bureau is at present considering the matter and will advise you as soon as a decision has been reached.

Very respectfully,  
Secretary

Very truly yours,  
J. M. Smith

Enclosed for you are two copies of the proposed amendment to the tariff on wool.

Very truly yours,  
J. M. Smith

Enclosed for you are two copies of the proposed amendment to the tariff on wool.

Very truly yours,  
J. M. Smith

Very truly yours,  
J. M. Smith  
Secretary



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF	Criminal No.82 200
AMERICA	:
	: Transcript of
	: Proceedings
v.	:
	: TRIAL
HERBERT G. CASE, JR.,	:
MACK BARNES, LEIF R.	: Newark, NJ
SIGMOND and SCIENTIFIC	: March 11, 1983
CHEMICAL PROCESSING	:
COMPANY, INC.,	:
	:
Defendants.	:

BEFORE:

HON. DICKINSON R. DEBEVOISE, U.S.D.J.  
and a Jury

Appearances:

W. HUNT DUMONT, UNITED STATES ATTORNEY  
BY: A PATRICK NUCCARONE, Assistant U.S.  
Attorney  
CHARLES S. CRANDALL, Assistant U.S.  
Attorney  
For the Government

JUSTIN P. WALDER, ESQ.  
For Defendant Case

ANTHONY R. MAUTONE, ESQ.  
For Defendant Barnes

DINO D. BLIABLIAS, ESQ.  
For Defendant Sigmond

\* \* \*

6 (The jury enters the courtroom).

7 THE COURT: Mr. Crandall.

8 MR. CRANDALL: Thank you, your  
Honor.

9 Gentlemen of the defense, ladies  
and gentlemen of  
10 the jury.

11 We are at the point of the case  
where the law

12 affords the prosecution an opportunity  
to address you again in  
13 what's known as a rebuttal.

14 \* \* \*

\* \* \*

- 6       What about the evidence produced  
this past Monday  
7       to refut the facts that Heflich and  
others testified about?  
8       Remember what was produced for you?  
It was Harry Starrett and  
9       Frank Perno, for the glorious prin-  
ciple that if they didn't  
10      know about Lone Pine, his attorney and  
his business  
11      consultant, how in the world would  
these men know about Lone  
12      Pine?  
13      Number 1, does that principle  
make any sense when  
14      the fact that his attorney never came  
on the scene until  
15      almost a year after this Lone Pine  
dumping scheme was done and  
16      the same with his business agent?

17           What kind of evidence is that  
that these men

18 didn't know about it?

19           I submit to you the things that  
Starrett, his

20 attorney--that's Heflich's attorney--  
testified about,

21 cleared away any smoke that may have  
been existing about who

22 was the crook and who was the cheat  
about the moneys that were

23 due and owing.

24           I submit to you that when Mr.  
Starrett testified,

25 he completely undermined what the  
defense had been saying all

1. along, that is, that Henry Heflich was  
trying to cheat SCP.

2       What did the evidence show when  
he testified?

3       There was a \$55,000 debt, that even  
SCP auditors said we owe  
4       them, and that there was an agreement,  
a \$10,000 check paid at  
5       that meeting, and then SCP, not  
Heflich, SCP reneged on a debt  
6       that they knew they owe.

7       Does even that limited testimony  
show you Heflich  
8       was a crook? I submit not.

9       Does that fact alone refute the  
testimony of  
10      various others concerning Heflich and  
Lone Pine and the  
11      awareness, awareness of these men?  
Does it refute Linda Walsh

12 and the statements she relied on Herb  
— Case and Mack Barnes to  
13 tell her when Heflich's trucks were  
coming up, if he didn't  
14 call himself? Otherwise there would  
be no manifest.

15 Well, it's a great scheme. Why  
should the girls  
16 in the office know about Lone Pine?  
Keep them in the dark.  
17 We just won't tell them Heflich's  
trucks are coming and there  
18 will be no manifest for Lone Pine.

19 You don't have to involve the  
office girls. It's  
20 a big secret. A secret of these men,  
I submit to you, ladies  
21 and gentlemen, is what it is.

22 Does it refute--does that testi-  
mony you heard

- 23 Monday refute George Borden who said  
he didn't remember
- 24 exactly, couldn't say who Herb Case  
was, but he remembers
- 25 being introduced to a fella named Case  
at the Lone Pine

1 Landfill?

2 Does it refute George Smajda's  
testimony? Does

3 it refute the entries in Mr. Case's  
diary about Lone Pine?

4 This? Read that diary, ladies and  
gentlemen, particularly, I

5 ask you, where it says "Change of  
inspect at LP." What does

6 that stand for, do you think?  
Lollipop?

7 The fact that you have a fire on  
June 26, 1978,

8 mentioned in the diary, George is  
mentioned, drums floating in

9 pool, Carter Wallace. Does that ring  
any bells?

10 Yes, it does, I submit, ladies  
and gentlemen. It

11 shows that Herb Case knew perfectly  
well where those materials



5030

12 that Heflich was taking were going, to  
the Lone Pine Landfill.

\* \* \*

1840

1. The first of the year was a very dry one.

2. The second of the year was a very wet one.

3. The third of the year was a very dry one.

4. The fourth of the year was a very wet one.

5. The fifth of the year was a very dry one.

6. The sixth of the year was a very wet one.

7. The seventh of the year was a very dry one.

8. The eighth of the year was a very wet one.

9. The ninth of the year was a very dry one.

10. The tenth of the year was a very wet one.

11. The eleventh of the year was a very dry one.

12. The twelfth of the year was a very wet one.

13. The thirteenth of the year was a very dry one.

14. The fourteenth of the year was a very wet one.

15. The fifteenth of the year was a very dry one.

16. The sixteenth of the year was a very wet one.

17. The seventeenth of the year was a very dry one.

18. The eighteenth of the year was a very wet one.

19. The nineteenth of the year was a very dry one.

20. The twentieth of the year was a very wet one.

## APPENDIX R



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
WALDER, SONDAK, BERKELEY & BROGAN  
A Professional Corporation  
Counsellors at Law  
17 Academy Street  
Newark, New Jersey 07102  
(201)624-2155  
Attorneys for Defendant

(Hon. Dickinson R.  
Debevoise)

Criminal No.82 200

UNITED STATES OF  
AMERICA

v.

HERBERT G. CASE, JR.,  
MACK BARNES, LEIF R.  
SIGMOND and SCIENTIFIC  
CHEMICAL PROCESSING  
COMPANY, INC.,

Defendants.

:  
: CRIMINAL ACTION  
: AFFIDAVIT IN  
: SUPPORT OF  
: MOTION FOR NEW  
: TRIAL PURSUANT  
: TO FED.R.CRIM.  
: PRO. 33  
:  
:  
:

JUSTIN P. WALDER, of full age, being  
duly sworn according to law, upon his oath  
deposes and says:

1. I am a member of the firm of  
Walder, Sondak, Berkeley & Brogan, P.A.,  
attorneys for defendant Herbert G. Case,  
and I am fully familiar with the above-  
captioned matter as well as the facts  
stated herein.

2. Following the verdict in this case on March 16, 1983, I proceeded onto the elevator to leave the building. As I entered the elevator, I noted the presence of several juror who had served on the case.

3. When I exited the elevator at the Post Office level, a group of jurors were there and were joined by some of those who had been on the elevator with me.

4. One of the jurors, Natalie Regan (No. 5), stated that she had a question and then inquired with regard to why the defendants had not taken the stand and why the case had been brought to such an abrupt halt.

5. A number of other jurors reiterated the question posed by Regan and state that they had discussed the defendant's failure to testify during their deliberations in this case. In addition to Regan, the statements were

made by Margaret Murphy (No. 6) and Joan Nolan (No. 11). Others in the group who expressed agreement with the statements of Regan, Murphy and Nolan included Geraldine Sudol (No. 2) and Arlene Williams (No. 4). Also present were James Masanto (No. 10) and Dorothy Ayrrer (No. 8).

6. The jurors' statements clearly indicated that they had considered the failure of defendants to testify and to present further evidence. They further indicated that the failure of defendants to take the stand had effected their deliberations and verdict in a manner adverse to defendants. One juror stated that they would have been happy to stay longer in order to hear the defendants.

7. I reported this incident to Judge Debevoise, who had presided over the trial, at 3:50 p.m. that afternoon, and to Assistant United States Attorney Patrick Nucciarone, at approximately 4:00 p.m.

$1/s$ 

Sworn to and subscribed  
before me this 29th day  
of March, 1983.

/ls



## APPENDIX S



SUBPOENA TO TESTIFY BEFORE GRAND JURY

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF NEW JERSEY

To: Any Responsible Officer or Custodian  
of Records  
SCIENTIFIC CHEMICAL PROCESSING CORP.

You are hereby commanded to appear in  
the United States District Court for the  
District of New Jersey at U.S.P.O. &  
Courthouse Building, Fourth Floor-Room 481  
in the city of Newark on the 10th day of  
July, 1981 at 10:00 o'clock a.m. to  
testify before the Grand Jury and bring  
with you (See attached Schedule A).

This subpoena shall remain in effect  
until you are granted leave to depart by  
the court or by an officer acting on  
behalf of the court.

This subpoena is issued on  
application of the United States of  
America.

WILLIAM W. ROBERTSON

UNITED STATES ATTORNEY

BY: JAMES A. PLAISTED

Assistant U.S. Attorney

970 Broad St., Newark, NJ 07102

(201) 645-6427/8

Dated: June 25, 1981

---

Angelo W. Locascio

Clerk

RETURN

Received this subpoena at \_\_\_\_\_ on \_\_\_\_\_

and on \_\_\_\_\_ at \_\_\_\_\_

I served it on the \_\_\_\_\_ with named \_\_\_\_\_

by delivering a copy to \_\_\_\_\_ and \_\_\_\_\_

tendering to \_\_\_\_\_ the fee for one \_\_\_\_\_

day's attendance and the mileage allowed  
by law.

Dated:---

Service Fees: --

Travel: --

Total: --

## SCHEDULE A

All records and documents of Scientific Chemical Processing Corp. related to the transportation of, treatment of, removal of, or disposal of chemicals, chemical wastes, hazardous materials, toxic materials, industrial wastes, and other waste products, handled, treated, transported or disposed of by Scientific Chemical Processing Corp. including but not limited to:

1. Accounts receivable
2. Accounts payable
3. General Ledgers
4. Customer Lists
5. Purchase orders

6. Letters and correspondence
7. Shipping orders
8. Bills of lading
9. Bank passbooks
10. Cancelled checks
11. Bank statements
12. Deposit slips, withdrawal slips and  
other bank records
13. Cables and telegrams
14. Internal notes and memoranda
15. Customer files

16. New Jersey Department of Environmental Protection Records including manifests, licenses, and permits
17. Loan agreements
18. Telephone toll records
19. Employee payroll records
20. Federal and state income tax returns
21. Shipping documents
22. Records of internal business meetings, phone calls, discussions and conferences
23. Waste disposal records
24. Lease arrangements



25. Sales journals
26. Cash disbursement journals
27. Cash receipts journals
28. Subsidiary journals and ledgers
29. Worksheets and ledgers used in  
preparation of financial statements  
and/or income tax returns
30. Mortgages
31. Records of penalties paid
32. Audit reports
33. Corporate resolutions and/or business  
statements
34. Records relating to chemical waste

shipment and storage

35. Any other records, books, ledgers,  
documents, correspondence or papers

for the period between January 1, 1975 to  
and including the present date.



① OCT 25 1984

③ ①  
Nos. 83-2081, 83-6929, and 83-6952

ALEXANDER L. STEVAG

CLERK

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**In the Supreme Court of the United States****OCTOBER TERM, 1984**

---

**LEIF R. SIGMOND, PETITIONER****v.****UNITED STATES OF AMERICA**

---

**MACK BARNES, PETITIONER****v.****UNITED STATES OF AMERICA**

---

**HERBERT G. CASE, JR., PETITIONER****v.****UNITED STATES OF AMERICA**

---

**ON PETITIONS FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT**

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**REX E. LEE***Solicitor General***STEPHEN S. TROTT***Assistant Attorney General***SAMUEL ROSENTHAL***Attorney**Department of Justice**Washington, D.C. 20530**(202) 633-2217*

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24 pp

## QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioners' motions for suppression of evidence obtained pursuant to state search warrants.

2. Whether petitioners were properly charged with violations of the mail fraud statute, 18 U.S.C. 1341, when certain features of their underlying conduct could have formed the basis for a prosecution under another statute (No. 83-6929).

3. Whether the district court erred in not ordering the government to provide a bill of particulars describing the content and volume of chemicals illegally treated by petitioners and whether there was sufficient evidence at trial on that subject.

4. Whether the district court erred in quashing petitioners' subpoena directed to the House of Representatives.

5. Whether the verdict should have been set aside on the ground that the jury considered petitioners' failure to testify.

6. Whether the jury's consideration of documents improperly appended to exhibits sent to the jury constituted reversible error (No. 83-6929).

7. Whether the district court erred in its instructions to the jury (No. 83-2081).

8. Whether there was a fatal variance between the allegations in the indictment regarding petitioner Sigmond and the evidence adduced at trial (No. 83-2081).

9. Whether the district court erred in sentencing petitioner Sigmond (No. 83-2081).



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# ***In the Supreme Court of the United States***

OCTOBER TERM, 1984

---

No. 83-2081

LEIF R. SIGMOND, PETITIONER

v.

UNITED STATES OF AMERICA

---

No. 83-6929

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UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## **OPINIONS BELOW**

The judgment order of the court of appeals (Pet. App. A1-A3)<sup>1</sup> is unreported. The written opinion of the district court dated November 16, 1982 (Pet. App. C1-C12) and the oral opinion of the district court rendered November 1, 1982 (Pet. App. J1-J57) are unreported.

---

<sup>1</sup>"Pet. App." refers to the appendix to the petition in No. 83-2081, unless otherwise indicated.

### JURISDICTION

The judgment of the court of appeals was entered on April 16, 1984. The petition for a writ of certiorari in No. 83-6929 was filed on June 14, 1984. The petitions for a writ of certiorari in Nos. 83-2081 and 83-6952 were filed on June 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted on one count of conspiracy, in violation of 18 U.S.C. 371, and on various counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Barnes was sentenced to a six-month term of imprisonment, a five-year term of probation, and a \$500 fine; petitioner Case was sentenced to an 18-month term of imprisonment, a five-year term of probation, and a \$2,000 fine; and petitioner Sigmond was sentenced to a two-and-one-half-year term of imprisonment, a five-year term of probation, and a \$10,000 fine.<sup>2</sup>

1. The evidence at trial showed that in 1977 and 1978 petitioners were affiliated with Scientific Chemical Processing Company (SCP), a company that operated two waste removal and processing plants in New Jersey. Petitioner Sigmond was president of the company, petitioner Case was vice-president, and petitioner Barnes was an employee. Petitioners made decisions about the types of waste products that would be handled by SCP and the disposal of such products. Tr. 2876-2879, 2903. Petitioners used two primary disposal methods: if waste material was in liquid form, they would dump it down the sewer by connecting a hose from a tanker truck to the sewer drain; if the material

---

<sup>2</sup>Scientific Chemical Processing Company (SCP), petitioners' co-defendant, was convicted of conspiracy and mail fraud and was fined a total of \$17,500. SCP did not appeal its convictions.

was in solid form, they engaged an independent contractor, Taylor Pumping Service, to dump the material at the Lone Pine Landfill in Freehold, New Jersey. *Id.* at 966, 3930. Between January and June 1978, the better part of approximately 18,000 drums of material taken from the two plants was dumped at Lone Pine (*id.* at 3930).

Most of the waste materials were by-products of industrial processes used by SCP's customers. In order to induce these customers to use SCP's services, petitioners promised them that SCP would use proper disposal methods for each customer's particular wastes. For example, petitioners assured Rohm & Haas that SCP would use a "fuel recovery program" to dispose of the acryloid wastes Rohm & Haas shipped to SCP (Tr. 1653-1655). Another customer, American Hoechst, dealt with SCP because petitioners had promised that wastes from American Hoechst's production process would be incinerated (*id.* at 3033-3034).

Petitioners also led public entities, such as the State of New Jersey and the Passaic Valley Sewer Commission (PVSC), to believe that it was using proper methods to treat and dispose of the wastes shipped to its plants. Documents SCP was required to submit to PVSC stated that SCP was simply "recovering solvents, \* \* \* blending fuels and \* \* \* selling them back to the companies" (Tr. 3535), and that no solvents were being treated in SCP's plants. In fact, SCP received solvents and dumped them down the sewer (*id.* at 1316, 1849, 3913).

SCP was required to inform the New Jersey Department of Environmental Protection of waste shipments, so that the Department could keep track of dumping operations. In order to avoid detection of SCP's Lone Pine operation, petitioners instituted a system under which the manifests that were to be submitted to the Department were left blank (Tr. 1070-1072). Drivers going to Lone Pine were not given

manifests (*id.* at 1767-1768). In addition, although SCP was required by state law to submit quarterly reports indicating, inter alia, the method by which each type of waste was to be handled, petitioners did not disclose to the State either that it had been engaged in dumping materials at Lone Pine or that it was using sewers to remove liquid wastes.

2. Prior to trial, the district court denied petitioners' motions for a bill of particulars, although it did require the government to provide petitioners with a list of the specific statutes and regulations petitioners were alleged to have violated (Pet. App. C4-C12, E1-E4). The district court also denied petitioners' motions for dismissal of the indictment, for suppression of certain evidence gathered by the State of New Jersey, and for severance of their trials (*id.* at C3-C4, E2-E3, J1-J57).

Petitioners did not testify at trial. However, they presented evidence intended to show, inter alia, that the materials SCP had dumped into sewers or at Lone Pine were not hazardous wastes. After petitioners were convicted, counsel for petitioner Case submitted an affidavit indicating that several jurors had approached him after the trial and had informed him that during their deliberations they had considered petitioners' failure to testify (Pet. App. R1-R4). Petitioners moved for a new trial, alleging, inter alia, that the jury had improperly considered petitioners' failure to testify, that the jury's consideration of certain business records erroneously appended to a trial exhibit deprived petitioner Barnes of a fair trial, and that the district court erred in failing to suppress evidence. The district court denied the motions.

3. The court of appeals affirmed petitioners' convictions in a judgment order (Pet. App. A1-A3). The court rejected petitioners' contentions that admission of evidence previously suppressed by a state court violated the Fourth

Amendment; that the conduct at issue was not properly prosecuted under the mail fraud statute; that the district court should have required proof of, and allowed discovery concerning, the chemical content of the materials alleged to have been illegally dumped; that petitioners were prejudiced by a variance between the indictment and the proof at trial; that the sentencing determination violated equal protection; that admission of a private diary into evidence constituted error; that the district court erred in instructing and supervising the jury and in refusing to enforce petitioners' subpoenas; and that petitioner Barnes was prejudiced by the inadvertent disclosure to the jury of documents not in evidence.

#### ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of the fact-bound questions petitioners present is not warranted.

1. Petitioners contend (83-2081 Pet. 14-30; 83-6929 Pet. 8-10; 83-6952 Pet. 7-18) that the district court should have suppressed evidence state authorities obtained pursuant to search warrants and eventually turned over to federal officials. That contention is without merit.

Petitioners contend that state law enforcement officers lacked sufficient evidence of illegal conduct to support issuance of the search warrants. But the district court examined the affidavits that accompanied the warrant application and concluded that they did establish probable cause to believe a crime was being committed;<sup>3</sup> the court cited, inter

---

<sup>3</sup>A New Jersey state court, after first refusing to suppress the evidence, had concluded that the warrants were not based on probable cause. The district court noted that it was "difficult to comprehend" the state court's conclusion that probable cause did not exist (Pet. App. J20-J21).



alia, the nighttime activity officers had observed at SCP, indications that SCP was piping waste material into the sewers without authorization, and the results of checks of the sewers above and below the SCP location (Pet. App. J20-J26). Its fact-bound conclusion regarding the existence of probable cause is supported by the affidavits and does not warrant further review.<sup>4</sup> The district court also concluded correctly (*id.* at J23-J27) that any taint from an improper state warrant would not affect the federal government, since the attorney for SCP had consented to use of the evidence by federal prosecutors and because, in any event, the federal government could have obtained the evidence through enforcement of a grand jury subpoena. See *Segura v. United States*, No. 82-5298 (July 5, 1984), slip op. 8-9.

2. Petitioner Barnes contends (83-6929 Pet. 10-14) that he should not have been charged with mail fraud because there is more "particularized federal legislation" that deals specifically with the problem of "illegal dumping of industrial chemical wastes" (*id.* at 11). The factual predicate for this contention is lacking. Barnes did not concede at any

---

<sup>4</sup>Even if it were found that the application for the state warrants did not contain sufficient information to support a finding of probable cause, the officers reasonably relied on the state court's issuance of the warrants. Petitioners do not attack the "good faith" of the officers, the manner in which the officers went about seeking and executing the warrants, or the role played by the issuing judge. Suppression of the evidence therefore would have been inappropriate. See *United States v. Leon*, No. 82-1771 (July 5, 1984).

Petitioners' claim that the warrant application was based on stale information is clearly without merit. The affidavits show (Pet. App. K1-K5, L1-L12, M1-M2) that the activities observed by the officers continued over a period of time, up to at least 18 days before the application for the warrants. In view of the pattern of apparently illegal activity the officers had observed in connection with an ongoing business operation, it was likely that such activity was continuing at the time of the warrant application.



point in the proceedings that his conduct was prohibited by the statute he cites, the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* (FWPCA); to the contrary, all the petitioners claimed that the government failed to show that the materials dumped down the sewer or at Lone Pine were "hazardous wastes" that required special treatment.

In any event, Barnes' contention is legally insubstantial. As the district court noted (Pet. App. J8-J9, J11), the essence of the offense charged in the indictment was a fraudulent scheme, not water pollution. Even if the mail fraud statute and the FWPCA addressed the same sort of conduct, Barnes' claim that the government was precluded from charging a violation of the more general statute lacks merit. This Court "has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *United States v. Batchelder*, 442 U.S. 114, 123-124 (1979). The courts of appeals have uniformly rejected claims that existence of a specific penal statute precludes application of a more general statute. See, e.g., *United States v. Grande*, 620 F.2d 1026, 1029-1030 (4th Cir.), cert. denied, 449 U.S. 830 (1980); *United States v. Carpenter*, 611 F.2d 113, 115 & n.3 (5th Cir.), cert. denied, 447 U.S. 922 (1980); *United States v. Jones*, 607 F.2d 269, 271-273 (9th Cir. 1979), cert. denied, 444 U.S. 1085 (1980).

3. Petitioners contend (83-2081 Pet. 31-38; 83-6929 Pet. 14-16; 83-6952 Pet. 28-33) that they were entitled to a bill of particulars describing the chemical composition of the substances sent to SCP and dumped down the sewer or at the Lone Pine landfill. That claim is without merit.

A bill of particulars is not a discovery tool; rather, its primary purpose is to inform defendants of the charges against them so that they can prepare a defense. The decision whether to grant a request for a bill of particulars is

within the discretion of the district court. *Wong Tai v. United States*, 273 U.S. 77, 82 (1927). The district court clearly did not abuse that discretion in this case.

Several months before trial, pursuant to a discovery order entered by the district court, petitioners were given access to numerous documents, including exhibits the government intended to introduce at trial. See Pet. App. C5-C6. The district court expressly found that shipping records made available to petitioners under the discovery order provided them "with all that they need to prepare their defense" with respect to the chemical composition of the dumped substances (*id.* at C8). Petitioners do not suggest why the records to which the district court referred were insufficient to permit them to prepare for trial or what other evidence they could have presented if they had had more detailed information prior to trial.

Petitioners also contend that there was insufficient evidence presented at trial to establish the chemical composition of the materials handled by SCP. But the prosecution was not required to show that particular substances had been illegally dumped; instead, it was required to prove that petitioners engaged in a "scheme and artifice to defraud" in disposing of substances (*e.g.*, that they had misrepresented the manner in which they disposed of substances). In any event, there was ample testimony about the nature of the materials handled by SCP. See, *e.g.*, Tr. 1646-1647, 1653-1656, 1659, 1686-1687, 3053-3054 (acryloids shipped by Rohm & Haas); *id.* at 3097-3098 (acid drums shipped by Konistoga); *id.* at 2246, 3033-3034 (materials consisting of 50% methanol, 50% water, and some salt and organic sulfides shipped by American Hoechst); *id.* at 3462-3465, 3052 (describing composition of Kolene shipped to SCP for disposal).

4. Petitioners contend (83-2081 Pet. 54-60; 83-6929 Pet. 16-20; 83-6952 Pet. 33-38) that the district court erred in failing to enforce a subpoena duces tecum served on the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. In fact, the district court's grant of the Committee's motion to quash was entirely proper.

Although petitioners refer to the "Speech and Debate privilege" (83-2081 Pet. 56), the district court did not rely on any such privilege in declining to enforce the subpoena under Fed. R. Crim. P. 17(c). Instead, the court concluded first that petitioners had not made the requisite showing of relevancy. See Tr. 4089 (finding that "the wide-ranging material which even [petitioners'] narrow subpoena seeks is either patently irrelevant or so marginally relevant as to offer no basis for ordering production"). The court also concluded that any documents likely to be produced under the subpoena had already been turned over to petitioners prior to trial. See *ibid.* (noting that the United States Attorney's Office "has everything the Subcommittee obtained" and that petitioners had had "access to an extraordinary volume of records in this case"). Either of these grounds in itself was sufficient to support the district court's decision to quash the subpoena. See *United States v. Nixon*, 418 U.S. 683, 699 (1974).

Moreover, petitioners concede that they were "unaware of what specifics the documents would reveal" (e.g., 83-2081 Pet. 55). Thus, they cannot show that the subpoena was anything more than a discovery device. This Court has held that a subpoena duces tecum "was not intended to provide a means of discovery for criminal cases." *United States v. Nixon*, 418 U.S. at 698; *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951).

5. Petitioners contend (83-2081 Pet. 47-54; 83-6929 Pet. 15-16; 83-6952 Pet. 18-28) that the jurors' consideration of their respective decisions not to testify denied petitioners their Fifth Amendment rights. The courts below correctly rejected this contention.

Fed. R. Evid. 606(b) precludes examination of a juror about "the mental process by which the verdict was arrived." *Rushen v. Spain*, No. 82-2083 (Dec. 12, 1983) (per curiam), slip op. 7 n.5. See also *Mattox v. United States*, 146 U.S. 140, 148-149 (1892). The rule provides that a juror may not testify "to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict \* \* \* or concerning his mental processes in connection therewith \* \* \*." Thus, as a practical matter, a verdict may not be impeached on the ground that some jury members allegedly disregarded the instruction that they should not consider a defendant's failure to testify.

Petitioners attempt to analogize consideration by jurors of an occurrence during the course of the trial (i.e., a defendant's failure to testify) to cases in which jurors have learned information from an external source, such as newspaper articles. The latter situation falls within an express exception to the prohibition of Rule 606(b). But in cases in which jurors are alleged only to have indulged in an inappropriate assumption about the proceedings before them, misconstrued a principle of law, or failed to adhere to the court's instructions regarding the proof adduced at trial, the courts of appeals are in agreement that Rule 606(b) prohibits conduct of a hearing into the jurors' deliberative process. See, e.g., *United States v. Friedland*, 660 F.2d 919, 927-928 (3d Cir. 1981), cert. denied, 456 U.S. 989 (1982) (consideration of defendants' failure to testify); *United States v. Jelsma*, 630 F.2d 778, 779 (10th Cir. 1980) (alleged confusion of jurors concerning number of persons involved in

gambling scheme); *United States v. D'Angelo*, 598 F.2d 1002, 1003-1005 (5th Cir. 1979) (allegation that jurors either misunderstood or intentionally misapplied the law); *United States v. Chereton*, 309 F.2d 197 (6th Cir. 1962), cert. denied, 372 U.S. 936 (1963) (allegation that conviction was improperly based on count that had been dismissed during trial); *Walker v. United States*, 298 F.2d 217, 226 (9th Cir. 1962) (jurors' alleged misconceptions about instructions on entrapment).

Petitioners Sigmond and Case contend that the jury instructions highlighted petitioners' failure to testify. However, the instruction given (Tr. 5065-5066) was a standard one.<sup>5</sup> Moreover, as the district court correctly noted, the charge was responsive to the "vehement closing arguments of defense counsel calling upon the jury to make inferences adverse to the Government by reason of the failure to call as witnesses various persons who were not part of the panoply of witnesses produced by the Government" (May 4, 1983 Tr. 76).<sup>6</sup>

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<sup>5</sup>The trial court gave the pattern jury instruction found at 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 17.19 (1977):

If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness may give rise to an inference that his testimony would be unfavorable to that party. However, no such conclusion should be drawn by you with regard to a witness who is equally available to both parties, or where the witness's testimony would be merely cumulative.

The jury will always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

<sup>6</sup>Petitioners allude briefly to statements made by the prosecutor in his rebuttal to the defense summations. Those statements (Pet. App. Q2-Q9) contain no reference to petitioners' failure to testify; they merely suggest that the evidence petitioners presented did not overcome evidence presented by the prosecution in certain areas. Counsel for petitioner Barnes specifically acknowledged that the prosecutor's rebuttal was proper in view of the defense summations. See 83-6952 Pet. 20.



Case suggests (83-6952 Pet. 21) that the trial court failed to distinguish "between a witness generally and petitioners." However, the court emphasized in the charge that a defendant has no duty of "calling any witnesses or producing any evidence" (*id.* at 20). Moreover, petitioners themselves specifically objected to the court's proposal that it instruct that a defendant has "no obligation to testify and the legal consequences of not testifying" (May 4, 1983 Tr. 75). Although Case suggests that petitioners were unaware that a missing witness instruction would be given, they themselves created the need for such an instruction by their own summations. As Case himself appears to acknowledge (83-6952 Pet. 20-21), petitioners had ample opportunity to voice their objections to the charge after the court instructed the jury. The record does not indicate that petitioners advised the trial court that they had changed their minds and wished the court to supplement the missing witness instruction with the instruction they previously had rejected. Thus, they cannot now complain that the instructions given were improper.<sup>7</sup>

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<sup>7</sup>Petitioners also rely on *Lakeside v. Oregon*, 435 U.S. 333 (1978). See, e.g., 83-6952 Pet. 22. However, the Court in that case held merely that it was not error to instruct the jury, over defendant's objection, that no adverse inference should be drawn from the failure of the defendant to testify. That holding does not support Case's claim that a defendant can successfully urge the court not to give such a charge and then complain later that failure to give the charge constitutes error; it suggests merely that had the trial court here ignored counsel's objection and given the instruction, there would have been no error.

Petitioner Case also seeks to reinforce his claim by contending (83-6952 Pet. 23-24) that in the particular circumstances of this case the trial court erred in failing to inquire on voir dire about the willingness of prospective jurors to adhere to the presumption of innocence. We note that Case did not raise the voir dire issue in the court of appeals, and the court did not mention the issue in its opinion. Absent exceptional circumstances not present in this case, the Court will not review an

6. Petitioner Barnes contends (83-6929 Pet. 20-23) that the jury's consideration of several pages that referred to Mack Barnes Trucking, which were inadvertently appended to exhibits sent to the jury, constituted reversible error. That contention lacks merit.

A defendant's conviction may not be reversed absent "plain error" where, as here, the court specifically offered defense attorneys the opportunity to examine all the exhibits before they were sent to the jury room (Tr. 5153). Under such circumstances, defense counsel's failure to call attention to any exhibit not in evidence "may well constitute a waiver." *United States v. Strassman*, 241 F.2d 784, 786 (2d Cir. 1957). See also Fed. R. Crim. P. 51, 52(b); *United States v. Camporeale*, 515 F.2d 184, 188 (2d Cir. 1975); *United States v. Bishop*, 492 F.2d 1361, 1365 n.5 (8th Cir.), cert. denied, 419 U.S. 833 (1974); *United States v. Burket*, 480 F.2d 568, 571 (2d Cir. 1973); *United States v. Yoppolo*, 435 F.2d 625, 627 (6th Cir. 1970).

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argument that was not raised in the court of appeals. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, Case concedes (83-6952 Pet. 23) that "the trial court is not obligated to inquire about the presumption of innocence at the voir dire stage of a criminal trial." See also, e.g., *United States v. Price*, 577 F.2d 1356, 1366 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979); *United States v. Ledee*, 549 F.2d 990, 992 (5th Cir.), cert. denied, 434 U.S. 902 (1977); *United States v. Gillette*, 383 F.2d 843, 849 (2d Cir. 1967). And see *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) (plurality opinion) (no reversible error in trial court's failure to inquire on voir dire into the possibility of racial or ethnic prejudice against the defendant); *id.* at 194-195 (Rehnquist, J., concurring). But see *United States v. Hill*, 738 F.2d 152 (6th Cir. 1984), petition for rehearing pending. Any conflict *Hill* might create on the question whether trial courts must inquire on voir dire concerning the presumption of innocence has not yet matured, since the government's petition for rehearing in that case is still pending. In any event, since the issue was not properly preserved here, this would not be an appropriate case in which to consider any such conflict.

In any event, a conviction clearly should not be reversed under such circumstances unless the documents were so prejudicial that the defendant was denied a fair trial. See *United States v. Camporeale*, 515 F.2d at 188.<sup>8</sup> Here, there was no significant prejudice to Barnes. The trial court instructed the jury that Mack Barnes Trucking was not an active business during the period at issue and that it should disregard the documents (Tr. 5157-5158). The court subsequently found specifically that petitioner Barnes was not prejudiced by submission of the documents to the jury (May 4, 1983 Tr. 75).<sup>9</sup> That finding by the trial court is entitled to considerable weight. See *United States v. Bruscino*, 687 F.2d 938, 941 (7th Cir. 1982) (en banc), cert. denied, 459 U.S. 1211, 1228 (1983).

7. Petitioner Sigmond contends (83-2081 Pet. 60-64) that the trial court erred in failing to instruct the jury concerning the defense theory of the case. That contention is unfounded.

Sigmond claims that the trial court should have instructed the jury that it was required to find that he had "knowledge" of the particular facilities being used by SCP for disposal of wastes (83-2081 Pet. 60-61). In fact, it was petitioner Case's counsel who argued to the trial court that the jury should consider that "Mr. Case claims that [persons with whom SCP dealt] at no time advised SCP or him that materials

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<sup>8</sup>Barnes asserts (83-6929 Pet. 22) that the Third Circuit spoke in *United States v. Friedland*, *supra*, in terms of whether there is a "reasonable possibility of prejudice." *Friedland* makes clear, however, that a new trial is not warranted unless documents were "so prejudicial that the defendant was denied a fair trial." 660 F.2d at 928.

<sup>9</sup>The trial court cited, *inter alia*, the overwhelming evidence of guilt of all petitioners, including Barnes; the fact that most of the payments shown on the documents occurred prior to the period of the conspiracy; and the fact that the government did not rely on Barnes' position as the basis for urging conviction (May 4, 1983 Tr. 75).



were taken to Lone Pine Landfill or that he was engaging in any illegal conduct in the disposal of materials" (C.A. App. 476a). Even if the proposed charge had been drafted to refer to Sigmond, as well as Case, the trial court was not required to give the charge in the particular form urged by petitioners. The court instructed the jury that "merely lax, negligent or careless" conduct was insufficient to sustain a conviction and that there must be a finding of "evil motive or corrupt intent" (*id.* at 497a). That instruction was clearly sufficient to encompass Sigmond's theory of the case.

Similarly, Sigmond cannot complain because the court declined to instruct the jury that petitioners could be acquitted if they acted "in accordance with the "state of the art" then in existence (see 83-2081 Pet. 61-64). Sigmond does not suggest that the trial court could be faulted for failing to give the instruction if no factual basis had been adduced at trial to support the theory. See *United States v. Blair*, 456 F.2d 514, 520 (3d Cir. 1972). In fact, there was no evidence at trial that the "state of the art" was to dump liquid wastes down the sewer or to use the Lone Pine landfill for disposal of solid wastes. In any event, because the charges here stemmed from petitioners' misrepresentations regarding the manner in which wastes were handled, any evidence relating to the "state of the art" could not have provided Sigmond with a legally viable defense.

8. Petitioner Sigmond contends (83-2081 Pet. 39-42) that there was a prejudicial variance between the charges in the indictment and the proof at trial. That contention, which appears to be merely a challenge to the sufficiency of the evidence that he participated in the Lone Pine aspect of the conspiracy charged in Count 1, does not warrant review by this Court. In any event, there was ample evidence of Sigmond's participation in the conspiracy, including testimony that Sigmond, as president of SCP, was told about the problems that allegedly necessitated the illegal dumping

practices at Lone Pine (Tr. 2945, 2948, 2952-2953) and that he specifically directed key employees in this aspect of SCP's operations (*id.* at 2948, 2952, 2954).

9. Petitioner Sigmond challenges the disparity between his sentence and those given petitioners Case and Barnes (83-2081 Pet. 42-46). Sigmond never filed a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35; nor did he otherwise present his contentions to the district court. In any event, the claim is insubstantial.

An otherwise lawful sentence may not be attacked solely because of disparity in sentencing. See, *e.g.*, *United States v. De La Fuente*, 550 F.2d 309, 310 (5th Cir. 1977); *Green v. United States*, 334 F.2d 733, 736 (1st Cir. 1964), cert. denied, 380 U.S. 980 (1965). Moreover, Sigmond's assumptions regarding the reasons for the disparity are incorrect. Contrary to Sigmond's assertion that he was penalized simply for his status as head of the SCP corporate hierarchy, the district court found that he was "totally in command and in control [of] \* \* \* the activities which \* \* \* led to the conviction here" (Pet. App. F9). Sigmond also cannot take advantage of the fact that petitioner Barnes received a lesser sentence because of the district court's perception that Barnes had been disadvantaged in certain respects.<sup>10</sup> It is well established that a sentencing court should take a defendant's background into account in imposing a sentence. See 18 U.S.C. 3577; *Williams v. New York*, 337 U.S. 241, 247 (1949).

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<sup>10</sup>The district court stated simply that petitioner Barnes was in a "somewhat different position than the other defendants, both as to background and as to role in the company" and that he was a "black man born in the south before the time when civil rights activities had changed the face of the south" (Pet. App. F15-F16).

**CONCLUSION**

The petitions for a writ of certiorari should be denied.  
Respectfully submitted.

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**OCTOBER 1984**